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C+
Kentucky. Laws, statutes, etc. Banking law

The Negotiable Instruments Law

OF KENTUCKY.

ANNOTATED

BY

CHARLES M. LINDSAY

OF THE LOUISVILLE BAR.

LOUISVILLE
GEO. G. FETTER COMPANY.
1904.

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PREFACE.

In August, 1895, the Commissioners for the Promotion of Uniformity of Legislation in the United States caused to be prepared by Mr. John J. Crawford, of the New York bar, "a bill relating to commercial paper, based on the English statute on that subject, and on such other sources of information as may be deemed proper to consult."

A draft of such a bill to be known as the Negotiable Instruments Law was presented to the Commissioners in August, 1896, was examined by them, section by section during the three days of their session, and adopted as a whole.

The English Bills of Exchange Act, on which the Negotiable Instruments Law was based, had been adopted in 1882 and had in its preparation involved "the work of more than one hundred trained lawyers, the co-operation of the mercantile community for years in its evolution, and its critical consideration by both Houses of Parliament[1]." The Negotiable Instruments Law in this country "has had the criticism of lawyers in the Commissioners from thirty-two States, who had it in consideration for more than a year during its preparation, and of leading text-writers and teachers on the subject of bills and notes."[2] The American Bankers' Association, through its Committee on Uniform Laws,

[1]6 Yale Law Journal, 132. [2]Yale Law Journal, January, 1901.

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has said of it: "A more useful or thoroughly prepared statute on Commercial Law would be difficult to find[3]." It has met the approval of the Judiciary Committees of twenty-four jurisdictions, of many State and city bar associations and has not yet met adverse criticism from the courts in the jurisdictions in which it has been adopted. The facts warrant the statement that there is probably no statute in the English language which "has received a tithe of the elaborate work laid out on the Negotiable Instruments Law[4]."

It is not asserted that the law is a perfect one, but it is believed that its imperfections are almost insignificant, and that many of what seem to be imperfections will disappear under a fair and reasonable construction. The Act is emphatically a law in aid of negotiability. It is especially so in Kentucky in which the development of commercial law seems to have been almost arrested for the past generation.

Unfortunately the Kentucky Act is not exactly like the original law recommended by the Commissioners. Section 19 and sub-section 6 of section 120 have been changed, the former much for the worse; and there has been omitted a valuable aid to construction found in the provision adopted in all other States, that "in any case not provided for in this Act the rules of the law merchant shall govern."

This book is not a text-book on the law of negotiable instruments. It is an effort to present the Kentucky Act in a form in which it can be easily consulted, to show the constructions which have been put on various sections by the courts of other States, and to refer under each section to the Kentucky cases which bear on the

[3] *Ib.* [4] 6 Yale Law Journal, 132.

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subject treated in it. Many of these cases arose on non-negotiable notes, but the rules established by them apply as well to negotiable instruments. Decisions of the former Superior Court have not been cited except where there is no decision of the Court of Appeals directly in point. It is believed that the citations include all pertinent cases reported up to June 30, 1904.

Under each section there are references to Eaton and Gilbert on Commercial Paper, and in most cases also to Norton on Bills and Notes, and to Randolph on Commercial Paper, these being the latest text-books referring to the Negotiable Instruments Law.

As these books refer to the sections as numbered in the New York Act, and as the greater part of the cases which may be decided under the Negotiable Instruments Law will probably come from New York, there has been added as an appendix a Table of Corresponding Sections of New York and Kentucky Acts.

The titles of cases construing the Act in other States are printed *in italics*.

Considering how loosely many of the Kentucky decisions have been reported in syllabuses and digested, the task of dealing with them could not be otherwise than difficult; and this difficulty, together with the fact that this book has been written under the disadvantage of a pressure of many other obligations, may, perhaps, excuse its imperfections.

CHARLES M. LINDSAY.

Louisville, July, 1904.

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The Negotiable Instruments Law has been adopted in the following jurisdictions:

Arizona, September 1, 1901.
Colorado, April 20, 1897.
Connecticut, April 5, 1897.
District of Columbia, January 12, 1899.
Florida, June 1, 1897.
Idaho, March 10, 1903.
Iowa, May 15, 1902.
Kentucky, June 13, 1904.
Maryland, March 29, 1898.
Massachusetts, January 1, 1899.
Montana, March 7, 1903.
New Jersey, April 4, 1902.
New York, October 1, 1897.
North Carolina, March 28, 1899.
North Dakota, March 7, 1899.
Ohio, January 1, 1903.
Oregon, February 16, 1899.
Pennsylvania, September 2, 1901.
Rhode Island, July 1, 1899.
Tennessee, May 13, 1899.
Utah, July 1, 1899.
Virginia, March 3, 1898.
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THE LAW OF NEGOTIABLE INSTRUMENTS.

Acts 1904, chapter 102. Approved March 24, 1904; in force June 13, 1904.

TITLE I.—NEGOTIABLE INSTRUMENTS IN GENERAL.

ARTICLE 1.*

FORM AND INTERPRETATION.

Section 1. Form of negotiable instrument.
2. Certainty as to sum; what constitutes.
3. When promise is unconditional.
4. Determinable future time; what constitutes.
5. Additional provisions not affecting negotiability.
6. Omissions; seal; particular money.
7. When payable on demand.
8. When payable to order; to whose order it may be drawn.

*The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3304-3326; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 1-23; Maryland, New York, 20-42; Ohio, 3171-3171*v*; Rhode Island, 9-31; Wisconsin, 1675-1 to 1675-23.

The sub-headings and catch-words prefixed to the sections are not in the original Act.

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9. When payable to bearer.
10. Terms, when sufficient.
11. Date, presumption as to.
12. Ante-dated and post-dated instruments.
13. When date may be inserted.
14. Blanks, when may be filled.
15. Incomplete instrument not delivered.
16. Delivery; when effectual; when presumed.
17. Construction where instrument is ambiguous; where there are omissions.
18. Liability of person whose signature does not appear; signing in trade or assumed name.
19. Signature by agent; authority to be in writing.
20. Liability of person signing as agent, *et cetera.*
21. Signature by procuration; effect of.
22. Effect of indorsement or assignment by infant or corporation.
23. Forged signature; effect of.

§ 1. **Form of Negotiable Instrument.**—An instrument to be negotiated (*a*) must conform to the following requirements:

1. It must be in writing (*b*) and signed (*c*) by the maker or drawer.
2. Must contain an unconditional (*d*) promise or order to pay a sum certain (*e*) in money (*f*).
3. Must be payable on demand (*g*) or at a fixed or determinable future time (*h*).
4. Must be payable to the order† of a specified person (*i*) or to bearer (*k*); and

†In the Act in other States, except North Carolina, the words "to order" are substituted for "to the order of a specified person."

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5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.‡

Eaton and Gilbert, Com. Paper, 161; *Norton, B. & N.,* 15, 26, 40, 43, 52, 55, 57, 59; *Randolph, Com. Paper,* §§ 60, 62, 92, 96, 106, 174.

(*a*) "Negotiated" should evidently be read "negotiable."

(*b*) "Written," see section 190.

(*c*) "When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing" (Ky. Stats., section 468).

The signature may be by mark, and no attestation is necessary.

Hinkle v. Dodge, 7 K. L. R., 526;

Staples v. Bedford L. & D. Bank, 98 Ky., 451; 17 K. L. R., 1035; 33 S. W., 403;

Chadwell v. Chadwell, 98 Ky., 643; 17 K. L. R., 1207; 33 S. W., 1118.

(*d*) As to when promise or order is unconditional, see section 3.

(*e*) As to certainty of amount, see section 2.

(*f*) See Morrison v. Tate, 1 Met. (58 Ky.) 569;
Piner v. Clary, 17 B. Mon. (56 Ky.) 663;
Johnson v. Vickers, 1 Duv. (62 Ky.) 267;
Glass v. Pullen, 6 Bush (69 Ky.) 351;
Ledford v. Smith, 6 Bush (69 Ky.) 132.

"Bills, drafts or checks payable in bank notes or currency, or other funds, wheresoever drawn or payable, shall be deemed negotiable, and treated in all respects as if drawn for money except as to the value of the currency in which they are payable." (Ky. Stats., section 478.) This statute does not include promissory notes, though such notes as were by the former law put on the footing of foreign bills of exchange were within its provisions. There is no provision in the Negotiable Instruments Law putting promissory notes on the footing of foreign bills of exchange.

An order payable in groceries is not a bill of exchange:

May v. Landsdown, 6 J. J. M. (29 Ky.) 165.

As the statute relates only to negotiable instruments payable in money, it does not affect warehouse receipts or bills of lading.

(*g*) As to when instruments are payable on demand, see section 7.

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‡The Wisconsin Act has an additional provision relating to orders drawn on or accepted by certain public officers, and to warehouse receipts, bills of lading and railroad receipts.

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(*h*) As to what is a determinable future time, see section 4.

(*i*) The words, "to the order of a specified person" mean no more than "to order"; see section 8. As to when instruments are payable to order, see section 8. "Person" includes a body of persons, whether incorporated or not (section 190).

(*k*) As to what instruments are payable to bearer, see section 9.

A certificate of deposit not payable to order or to bearer, for instance, to the person named therein "or his assigns," is not a negotiable instrument.

Zander v. New York Security & Trust Co., 73 N. Y. S., 900; 81 App. Div., 635.

See also *Westberg v. Chicago Lumber & Coal Co.*, 117 Wis., 589; 94 N. W., 572.

§ 2. **Certainty as to sum; what constitutes.**— The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with provision that upon default in payment of any installment,* the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee (*a*), in case payment shall not be made at maturity.

Eaton and Gilbert, Com. Paper, 199; *Norton, B. & N.,* 42, 51, 53; *Randolph, Com. Paper,* §§ 200, 201.

(*a*) But the stipulations mentioned in this sub-section, though not impairing the negotiability of the instrument, are deemed in Kentucky to be against public policy and will not be enforced.

Thomasson v. Townsend, 10 Bush (73 Ky.) 114;
Gaar v. Louisville Banking Co., 11 Bush (74 Ky.) 189;
Rilling v. Thompson, 12 Bush (75 Ky.) 310;
Witherspoon v. Musselman, 14 Bush (77 Ky.) 214;

*In the Act in other States, except North Carolina the words, "or interest" are added.

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Pryse v. People's B. L. & S. Ass'n., 19 K. L. R., 752; 41 S. W., 574;

Kentucky Trust Co. v. Third National Bank, 106 Ky., 232; 20 K. L. R., 1737; 50 S. W., 43.

Where a stipulation to pay attorneys' fees is valid, such fees may be collected where the note has been put in the hands of an attorney for collection, though no suit has been brought.

Thomson v. Ornbaum, 75 P. (Mont.) 953.

§ 3. **When promise is unconditional.**—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with it:

1. An indication of a particular fund, out of which reimbursement is to be made, or a particular account to be debited with the amount (*a*); or
2. A statement of the transaction which gives rise to the instrument (*b*).

But an order or promise to pay out of a particular fund is not unconditional (*c*).

Eaton and Gilbert, Com. Paper, 192; *Norton, B. & N.,* 37, 39, 49; *Randolph, Com. Paper,* § 92.

(*a*) Bank of Kentucky v. Sanders, 3 Mar. (10 Ky.) 185;
Early v. McCart, 2 Dana (32 Ky.) 414.

See as to instruments secured by collateral, note (*a*) to section 5.

(*b*) Section 4223, Ky. Stats., provides that all contracts with a peddler not holding a license shall be void, that a note given for articles or patent rights sold by a peddler shall be void, unless there be written or printed across its face "Peddlers' Note," and that, in any event, all defenses may be made against the holder which might have been made against the payee. This statute, in so far as it requires a license for the sale of patent-rights, violates the Constitution of the United States (Commonwealth v. Petty, 96 Ky., 452; 29 S. W., 291) but has been held not to violate it in the provisions mentioned concerning *notes* given for patent articles or rights. Bohon's Assignee v. Brown, 101 Ky., 354; 19 K. L. R., 540; 41 S. W., 273; Rumbley v. Hall, 107 Ky., 349; 21 K. L. R., 1071; 54 S. W., 4. The decisions in other States on like statutes are conflicting. See State v. Cook, 107 Tenn., 499 (62 L. R. A., 174) and cases there cited. In the Federal courts such statutes have been held to be unconstitutional

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in the particular mentioned. Woolen v. Banker, 2 Flip., 33, Fed. Cas. No. 18,030; Castle v. Hutchinson (C. C.) 25 Fed., 394; Reeves v. Corning (C. C.) 51 Fed., 787; Pegram v. American Alkali Co. (C. C.) 122 Fed., 1,000 (distinguishing Patterson v. Kentucky, 97 U. S., 501, 24 L. Ed., 115); Union County National Bank v. Ozan Lumber Co., 127 Fed., 206. See further, as to such notes, section 57.

(*c*) For example, an order to pay out of a fund of $300.00, "or what may be due on my deposit book." *Nat. Savings Bank v. Cable*, 73 Conn., 568; 48 A., 428.

Nichols v. Davis, 1 Bibb (4 Ky.) 491;
Mershon v. Withers, *Ib.*, 504;
Curle v. Beers, 3 J. J. M. (26 Ky.) 174;
Carlisle v. Dubree, *Ib.*, 542;
Strader v. Bachelor, 8 B. M. (47 Ky.) 169.

The test is whether the maker or drawee is to be confined absolutely to the fund mentioned, or whether the drawee would have power to charge the bill up to the general account of the drawer, or the payee could compel payment of the note by the maker, if the designated fund should turn out to be insufficient.

§ 4. **Determinable future time; what constitutes.**—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingeny is not negotiable (*a*), and the happening of the event does not cure the defect.

Eaton and Gilbert, Com. Paper, 213; *Norton, B. & N.,* 35, 49; *Randolph, Com. Paper,* §§ 109-115.

(*a*) Nichols v. Davis, 1 Bibb (4 Ky.) 491;
Strader v. Bachelor, 8 B. M. (47 Ky.) 169

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§ 5. **Additional provisions not affecting negotiability.**—An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable; but the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorize the sale of collateral securities in case the instrument be not paid at maturity (*a*); or
2. Authorizes a confession of judgment if the instrument be not paid at maturity (*b*); or
3. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal (*c*).*

Eaton and Gilbert, Com. Paper, 234. *Norton, B. & N.,* 48, 50, 51.

(*a*) The negotiability of a note is not destroyed by the fact recited in it that it is secured by a vendor's lien on real estate.

Duncan v. Louisville, 13 Bush (76 Ky.) 378;

McCarty v. Louisville Banking Co., 100 Ky., 4; 18 K. L. R., 569; 37 S. W., 144.

A reference in the instrument to the deed, mortgage or other writing securing its payment incorporates such other writing into the instrument, the negotiability of which may be destroyed by provisions in the other writing, such, for example, as make the amount uncertain, or precipitate or extend the time of payment.

(*b*) "Powers of attorney to confess judgment, or to suffer judgment to pass by default, or otherwise, and every release of errors given before an action is instituted, are declared void," Kentucky Stats., section 416; and any person appearing in Kentucky under such power shall forfeit to the defendant for whom he appears, one thousand dollars and shall be liable for damages (sections 417, 418). The insertion of such a power in an instrument does not, however, make the instrument not negotiable *Cf.* Gaar v. Louisville Banking Co., 11 Bush (74 Ky.) 180.

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*In the Wisconsin Act these words are added, "or authorize the waiver of exemptions from execution."

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(*c*) In the Negotiable Instruments Law, as adopted in most of the States, it is provided that the negotiable character of the instrument is not affected by a provision which "waives the benefit of any law intended for the advantage or protection of the obligor"—for example, a waiver of homestead or exemptions. No such provision is in the Kentucky Act. Such waiver is void, Moxley v. Ragan, 10 Bush (73 Ky.) 156, but probably does not destroy the negotiability of the instrument. *Cf.* Gaar v. Louisville Banking Co., *supra.*

§ 6. **Omission; Seal; Particular Money.**—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated (*a*); or
2. Does not specify the value given, or that any value has been given therefor (*b*); or
3. Does not specify the place where it is drawn or the place where it is payable (*c*); or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made (*d*).

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument (*e*).

Eaton and Gilbert, Com. Paper, 241. *Norton, B. & N.,* 25, 72, 74. *Randolph, Com. Paper,* §§ 75, 178.

(*a*) Stout v. Cloud, 5 Litt. (15 Ky.) 205.

Section 17 provides that "where the instrument is not dated, it will be considered to be dated as of the time it was issued."

(*b*) The words, "value received" are not necessary. By section 50, a valuable consideration is presumed.

(*c*) Promissory notes are no longer required in Kentucky to be made payable at a bank in order to be negotiable. See section 184. As to filing blanks, see sections 13, 14.

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(*d*) For example, "in greenbacks,"
Ledford v. Smith, 6 Bush (69 Ky.) 129;
or "in gold,"
Glass v. Pullen, *Ib.*, 346.
(*e*) As to "Peddlers' Notes," see section 3, note (*b*).

§ 7. **When Payable on Demand.**—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight (*a*), or on presentation; or
2. In which no time for payment is expressed (*b*).

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

Eaton and Gilbert, Com. Paper, 209. *Norton, B. & N.,* 40, 41, 209, 341, 345.

(*a*) The distinctions formerly existing between instruments payable on demand and those payable at sight (for which see Daniel, Neg. Inst., sections 617, 619) are abolished by this statute.
(*b*) A note reading, "I promise to pay to the order of A. $2,000 at his office," is payable on demand, and in this respect can not be varied by oral evidence. *McLeod v. Hunter,* 63 N. Y. S., 153; 29 Misc. Rep., 558.

§ 8. **When Payable to Order; to Whose Order it May be Drawn.**—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee; or
2. The drawer or maker (*a*); or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees (*b*); or

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6. The holder of an office for the time being (*c*).

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty (*d*).

Eaton and Gilbert, Com. Paper, 223. *Norton, B. & N.,* 59, 60, 61.

(*a*) A note payable to the order of the maker is not complete until indorsed by him. Kentucky Statutes, section 480. See *post,* section 184.

Pace v. Welmending, 12 Bush (75 Ky.) 142;

Bramblett v. Caldwell, 105 Ky., 202; 20 K. L. R., 1123; 48 S. W., 982. See section 184.

(*b*) For example, an instrument payable to A, B and C, or any of them, or any two of them.

Apart from the statute, an instrument payable to one or more of several payees was not negotiable, it being payable to any one of them only on the contingency of its not having been paid to any other of them. (Daniel Neg. Inst., 5th Ed., section 103.) This provision has changed the law of Kentucky.

(*c*) For example, an instrument payable to trustees of an association *or their successors in office.* This provision changes the law of Kentucky. Apart from the statute, an instrument so payable was not negotiable. Daniel Neg. Inst. (5th Ed.) sec. 101.

(*d*) "A written obligation to a person or persons who, or some of whom, happen to be dead at the time of its execution, may be proceeded on by the representative of such person or by the survivor, as if it had been executed in the lifetime of such dead person or persons" (Ky. Stats., sec. 477). It does not follow, however, that a note, bill or check can be negotiated by such survivor or representative.

§ 9. **When Payable to Bearer**—The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable (*a*); or

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4. When the name of the payee does not purport to be the name of any person (*b*); or
5. When the only or last indorsement is an indorsement in blank (*c*).

Eaton and Gilbert, Com. Paper, 231. *Norton, B. & N.,* 59, 60, 63, 110. *Randolph, Com. Paper,* § 169.

(*a*) An instrument payable to the "estate of A or order" is generally treated as payable to the personal representative of A. See Shaw v. Smith, 150 Mass., 166, 22 N. E., 887, 6 L. R. A., 348. In Lewisohn v. Kent & Stanley Co., 87 Hun., 257, such a note was treated as a note with a fictitious payee, and, therefore, when negotiated by the maker, payable to bearer.

(*b*) For example, an instrument payable to "cash," or to "sundries," or to "merchandise."

(*c*) As to what is an indorsement in blank, and its effect on negotiation, see section 34.

This provision applies only where the *transfer* of the instrument is by an indorsement in blank.

§ 10. **Terms, When Sufficient.**—The negotiable instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof (*a*).

Eaton and Gilbert, Com. Paper, 223.

(*a*) As to the construction of ambiguous instruments, see section 17.

§ 11. **Date, Presumption as to.**—When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

Eaton and Gilbert, Com. Paper, 246. *Norton, B. & N.,* 72.

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§ 12. **Ante-dated and Post-dated Instruments.**—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered, acquires the title thereto as of the date of delivery.

Eaton and Gilbert, Com. Paper, 246. *Norton, B. & N.,* 405.

§ 13. **When Date may be Inserted.**—When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly (*a*). The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

Eaton and Gilbert, Com. Paper, 248. *Norton, B. & N.,* 72.

(*a*) See section 14.

§ 14. **Blanks, When may be Filled.**—Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein (*a*). And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount (*b*). In order, however, that any such instru-

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ment when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiable (*c*) to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time (*d*).

Eaton and Gilbert, Com. Paper, 253. *Norton, B. & N.,* 249, 258. *Randolph, Com. Paper,* § 189.

(*a*) Bank of Limestone v. Penick, 5 Mon. (21 Ky.) 28;
Taylor v. Craig, 2 J. J. M. (25 Ky.) 461;
Bank of Com. v. Curry, 2 Dana (32 Ky.) 142;
Hall v. Bank of Com., 5 Dana (35 Ky.) 258;
Jones v. Shelbyville F. & L. Ins. Co., 1 Met. (58 Ky.) 62;
Smith v. Lockridge, 8 Bush (71 Ky.) 427;
Griffith v. Collier, 4 K. L. R., 260;
Cason v. Grant County Bank, 97 Ky., 487; 17 K. L. R., 344; 31 S. W., 40.

The authority, however, is only to *complete* the instrument; there is no authority to insert matter not essential to its completeness. While one with whom another leaves a note which he has signed, but left blank, may fill up the blanks and so bind the other, he may not make a new instrument, by erasing or interlining material words, so as to change the terms written or printed in the blank form; nor may he, after having filled the blanks in such note and used it, afterwards, on recovering the note, erase material words and substitute others.

Ofenstein v. Bryan, 20 App. D. C., I.

(*b*) Woolfolk v. Bank of America, 10 Bush (73 Ky.) 518. Observe that this rule applies only when the incomplete instrument has been *delivered.* See section 15.

(*c*) "Negotiable" evidently means "negotiated."

(*d*) See cases cited in note (a).

As to alterations, see sections 124, 125.

§ 15. **Incomplete Instrument not Delivered.**—Where an incomplete instrument has not been delivered,

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it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Eaton and Gilbert, Com. Paper, 253. *Norton, B. & N.,* 258, 260.

§ 16. **Delivery; When Effectual; When Presumed.** —Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting,* or indorsing as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed (*a*). And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved (*b*).

Eaton and Gilbert, Com. Paper, 254. *Norton, B. & N.,* 68.

(*a*) Thus, one who has signed a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him but lost by him, or stolen from

*The word "accepting" is not in the North Carolina Act.

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him, or even from some one else after his death. This provision has radically changed the law. Daniel Neg. Inst. (5th Ed.) sections 63, 64, 65.

(*b*) *Poess v. Twelfth Ward Bank*, 86 N. Y. S., 857.

§ 17. **Construction Where Instrument is Ambiguous; Where there are Omissions.**—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount.
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof (*a*).
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.
4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail (*b*).
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election (*c*).
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an endorser (*d*).
7. Where an instrument containing the words, "I promise to pay," is signed by two or more per-

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sons, they are deemed to be jointly and severally liable thereon (*e*).

Eaton and Gilbert, Com. Paper, 262, 264 to 267. *Norton, B. & N.,* 56, 58, 143, 172.

(*a*) A note payable two years after date, "with interest from ....." until paid, bears interest from date.

Miller v. Cavanagh, 99 Ky., 377; 18 K. L. R., 183; 35 S. W., 920.

A note payable on demand, "with interest," bears interest from its date. Whitton v. Swope, 1 Litt. (11 Ky.) 160. But a note payable on demand and not containing a promise to pay interest, bears interest only from demand.

Patrick v. Clay, 4 Bibb (7 Ky.) 246;
Francis v. Castleman, *Id.*, 282;
Nelson v. Cartmell, 6 Dana (36 Ky.) 7.

In Francis v. Castleman, *supra*, the note did not express a time for payment. By section 7, such an instrument would now be payable on demand.

(*b*) But the provisions must be reconciled if it can be done by reasonable construction.

(*c*) A writing reading "Ninety days after date, ... promise to pay to the order of W. H. $500.00, and charge to the account of ..... Payable at Bank of Paducah, D. J." may be sued on as a note.

Bradley v. Mason, 6 Bush (69 Ky.) 603.

(*d*) As to the liability of such an endorser, see section 64. It is the policy of the statute to make all irregular parties indorsers.

(*e*) Harrow v. Dugan, 6 Dana (36 Ky.) 341.

§ 18. **Liability of Persons Whose Signature does not Appear; Signing in Trade or Assumed Name.** —No person is liable on the instrument whose signature does not appear thereon (*a*), except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Eaton and Gilbert, Com. Paper, 269. *Norton, B. & N.,* 66.

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(*a*) As to liability on instruments drawn in favor of or indorsed to and by a "cashier" or other like officer, see section 42.

An undisclosed principal is not liable on a note given in a transaction executed by an agent on behalf of the principal.

Ranger v. Thalmann, 82 N. Y. S., 846; 84 App. Div., 341.

Members of a partnership are not liable on a note executed by one of the firm in his own name, although the property for which the note was given was used by the firm.

Macklin v. Crutcher, 6 Bush (69 Ky.) 401.

As to signature by mark, see section 1, note (*c*).

§ 19. **Signature by Agent; Authority.**—The signature of any party may be made by an agent duly authorized in writing (*a*).

Eaton and Gilbert, Com. Paper, 82. *Norton, B. & N.*, 65.

(*a*) In the Negotiable Instruments Law as adopted in other States and in the English Bills of Exchange Act (section 91), the requirement that such authority shall be in writing is omitted; and the Negotiable Instruments Law, as adopted in other States, provides that "No particular form of appointment is necessary for this purpose; and the authority of the agent may be established in other cases of agency"—all of which is but declaratory of the law-merchant and of the law of Kentucky. As this section makes no exceptions, it follows that the authority of an agent to indorse "for collection" or "for deposit" must be in writing, a requirement which must lead to great inconvenience.

§ 20. **Liability of Persons Signing as Agent, etc.**—Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized (*a*); but the mere addition of words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability (*b*).

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Eaton and Gilbert, Com. Paper, 83. *Norton, B. & N.,* 65, 66.

(*a*) The effect of this section is to make an agent liable *on the instrument:* (1) Where he fails to disclose his principal, even though the agent has authority to act. (2) Where the agent has no authority to act, even though he discloses his principal. Thus, if the agent sign "A. B., agent," he is liable personally whether he had authority to act for his principal or not; but if he signs the paper "C. D., by A. B., agent," the agent is not liable if he had authority to act. This section in so far as it makes the agent liable *on the instrument itself,* when he in fact has no authority, but discloses the name of his principal, has changed the law of Kentucky.

The form in which an instrument is signed by an agent may be material. Thus, apart from any question of the agent's authority to act, an instrument running, "I promise to pay," signed "A. B., for C. D.," is the obligation of A. B.

Offutt v. Ayres, 7 Mon. (23 Ky.) 356.
Patterson v. Henry, 4 J. J. M. (27 Ky.) 126;
Musgrove v. McIlroy, 5 J. J. M. (28 Ky.) 646.

The only form which can be known to be safe under any circumstances is a signature in the name of the principal by the agent—for instance, "A. B., by C. D., agent."

As to the liability of an agent negotiating an instrument without indorsement, see section 69. See, further, as to indorsements in a representative capacity, section 44, and as to indorsements by a "cashier" or like officer of a bank or corporation, section 42.

(*b*) A trustee of an insolvent firm, appointed by such firm and its creditors, who signs an instrument as "Trustee," is not personally liable on the instrument where it is given for property purchased from the payee for the trust estate, and the payee is one of the creditors of the firm.

Megowan v. Peterson, 173 N. Y., 1; 65 N. E., 738.

Although, in general, the word "agent," "trustee," etc., added to a signature is treated as a mere *designatio personae,* and does not relieve the person signing from individual liability, yet public officers, acting in their public capacity, with the knowledge of the other contracting party, are not individually liable. Randolph, Com. Paper, section 132.

Bank of Kentucky v. Sanders, 3 Mar. (10 Ky.) 184;
Murray v. Carothers, 1 Met. (58 Ky.) 71.

§ 21. **Signature by Procuration; Effect of.**—A signature by "procuration" operates as notice that the

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agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

Eaton and Gilbert, Com. Paper, 98. *Norton, B. & N.,* 65. *Randolph, Com. Paper,* § 1012.

§ 22. **Effect of Indorsement or Assignment by Infant or Corporation.**—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon (*a*).

Eaton and Gilbert, Com. Paper, 51. *Norton, B. & N.,* 220, 222, 226. *Randolph, Com. Paper,* §§ 271, 1467.

(*a*) The indorsement or assignment of an infant is voidable, not void.

Semple v. Morrison, 7 Mon. (23 Ky.) 298.

This provision "means not only that the infant is not liable upon the implied contract of indemnity unless he chooses to be; but, according to Judge Story, it means also that the infant may intercept the payment to the indorsee by disaffirming the contract, and returning the consideration, and recover the money called for in the instrument of the maker or acceptor. If the disaffirmance is made before payment to an indorsee, it is a defense against the indorsee. If made after payment, and the infant is payee, the acceptor or maker must pay the money twice, because they have warranted the capacity of the infant. If parties prior to the infant receive notice of the infant's disaffirmance, they are discharged as to the parties subsequent to the infant, because these persons have lost their title to the paper by the avoidance of the indorsement, and they must look to their intermediate warranties to protect themselves. But, except as against himself, the indorsement is effectual as to all parties; and neither the maker, acceptor, nor any other party can refuse to pay the instrument on the ground that an intermediate indorser is an infant." Norton, B. & N., 220.

As an indorser warrants that all prior parties had capacity to

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contract (sections 65, 66), he is not released because a corporation which had indorsed the instrument had no capacity to do so.

Monarch Co. v. Farmers' Bank, 105 Ky., 430; 20 K. L. R., 1351; 49 S. W., 317.

§ 23. **Forged Signature; Effect of.**—Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature (*a*), unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority (*b*).

Eaton and Gilbert, Com. Paper, 82. *Norton, B. & N.,* 254.

(*a*) Hon v. Harned, 18 K. L. R., 864; 38 S. W., 688.

(*b*) Where a payee's indorsement was forged, one who afterwards indorses the note for the accommodation of the maker is liable to a subsequent indorsee who was compelled to take the note up before maturity.

Packard v. Windholz, 82 N. Y. S., 392; 84 N. Y. S., 666.

Where one procures a check by falsely pretending that he is another person (the maker knowing that there is such a person) and indorses it in the name of the payee, the indorsement conveys no title, and the bank cashing the check can not charge the drawer's account with the money paid.

Tolman v. American Nat. Bank, 22 R. I., 462; 48 A., 480.

The negligence of the bank lay in not requiring identification. See, however, Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. St., 230; 46 A., 420; 50 L. R. A., 75; Sherman v. Corn Exchange Bank, 86 N. Y. S., 341.

As to alteration of the instrument, see sections 124, 125.

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ARTICLE II.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

Section 24. Presumption of consideration.
25. Consideration, what constitutes; antecedent debt.
26. Who deemed holder for value.
27. When lien on instrument constitutes holder for value.
28. Effect of absence or failure of consideration.
29. Liability of accommodation party.

§ 24. **Presumption of Consideration.**—Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value (*a*).

Eaton and Gilbert, Com. Paper, 301. *Norton, B. & N.,* 274.

(*a*) *Bringman v. Von Glahn,* 71 N. Y. S., 845; 71 App. Div., 537;
Murray v. Clayborn, 2 Bibb (5 Ky.) 300;
Dodge v. Bank of Kentucky, 2 Mar. (9 Ky.) 614;
Brown v. Hall, *Ib.,* 599;
Early v. McCart, 2 Dana (32 Ky.) 414;
Johnson v. Offutt, 4 Met. (61 Ky.) 22;
James v. Hayden, 10 K. L. R., 534;
Kiesewetter v. Kress, 24 K. L. R., 405, 1239; 68 S. W., 633; 70 S. W., 1065;

Note.—The numbers of the section of this article in other States than Kentucky are as follows: Arizona, 3327-3332; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 24-29; Maryland, 43-48; New York, 50-55; Ohio, 3171w-3127a; Rhode Island, 32-37; Wisconsin, 1675-50 to 1675-55.

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Power, etc. v. Hambrick, 25 K. L. R., 30; 74 S. W., 660;
Cox v. Cox, 25 K. L. R., 1934; 79 S. W., 220;
Beattyville Bank v. Roberts, 25 K. L. R., 1796; 78 S. W., 901;

A consideration need not be stated, section 6.

§ 25. Consideration, What Constitutes; Antecedent Debt.—Value is any consideration sufficient to support a simple contract (*a*). An antecedent or pre-existing debt constitutes a value (*b*), which is deemed such, whether the instrument is payable on demand or at a future time.

Eaton and Gilbert, Com. Paper, 287. *Norton, B. & N.,* 270, 317. *Randolph, Com. Paper,* § 465.

(*a*) *Bank of Monticello v. Dooly,* 113 Wis., 590; 89 N. W., 490;
Mohlman Co. v. McKane, 69 N. Y. S., 1046; 60 App. Div., 546.

(*b*) Where the holder of the antecedent debt receives the instrument before maturity in payment or partial payment of the debt, or incurs a legal obligation to forego the pursuit of an existing remedy, or has in any other form parted with any value, or given any new or additional consideration, in good faith and without notice, he is a holder in due course, although the delivery to him is a fraudulent diversion of the instrument.

Petrie v. Miller, 67 N. Y. S., 1043; 173 N. Y., 596;
Payne v. Zell, 98 Va., 294; 36 S. E., 379;
Black v. First Nat. Bank, 96 Md., 399; 54 A., 88;
Boston Steel & Iron Co. v. Steuer, 183 Mass., 140; 66 N. E., 646;
Alexander v. Springfield Bank, 2 Met. (59 Ky.) 535;
May v. Quimby, 3 Bush (66 Ky.) 102.

But where the instrument is taken only as *collateral security* for an antecedent debt, no consideration of any kind being given for it, the rule in Kentucky, unless changed by this statute, is that the person so taking the instrument is not a holder in due course.

Lee v. Smead, 1 Met. (58 Ky.) 634;
Thompson v. Poston, 1 Duv. (62 Ky.) 392;
Schuster v. Jones, 22 K. L. R., 568; 58 S. W., 595;
Cf. Haldeman v. German Security Bank, 19 K. L. R., 1691; 44 S. W., 383.

This section, especially when read in connection with sections 27 and 52, seems to have changed the law in this particular, and

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it was held to have this effect under like sections of the New York statute in *Brewster v. Shrader*, 57 N. Y. S., 606; 26 Misc. Rep., 480, thus adopting the rule established in Railroad Company v. National Bank, 102 U. S., 14; 26 L. Ed., 61. But in *Sutherland v. Mead*, 80 N. Y. S., 504; 80 App. Div., 103, and in *Roseman v. Mahoney*, 83 N. Y. S., 749; 86 App. Div., 377 (both decided in *appellate* divisions of the Supreme Court of New York) it was held that this section did not change the law, at any rate as to the liability of an accommodation party. The question does not appear to have been decided by the Court of Appeals of New York.

§ 26. **Who Deemed Holder for Value.**—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time (*a*).

Eaton and Gilbert, Com. Paper, 305. *Norton, B. & N.,* 309. *Randolph, Com. Paper,* § 465.

(*a*) See section 58.

§ 27. **When Lien on Instrument Constitutes Holder for Value.**—Where the holder has a lien on the instrument, arising either from a contract or by implication of law, he is deemed a holder for value to the extent of his lien (*a*).

Eaton and Gilbert, Com. Paper, 307. *Norton, B. & N.,* 316.

(*a*) See section 25, note (*b*).

§ 28. **Effect of Absence or Failure of Consideration.**—Absence or failure of consideration is a matter of defense as against any person not a holder in due course (*a*), and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise.

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Eaton and Gilbert, Com. Paper, 275. *Norton, B. & N.,* 282. *Randolph, Com. Paper,* §§ 540, 558.

(*a*) As to what is necessary to constitute one a holder in due course, see sections 26-29. The term, "holder in due course," is equivalent to "bona fide holder for value without notice," "innocent holder," etc.

§ 29. **Liability of Accommodation Party.**—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor (*a*), and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value (*b*), notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party (*c*).

Eaton and Gilbert, Com. Paper, 309. *Norton, B. & N.,* 176.

(*a*) That is, without receiving value *for the instrument.*

(*b*) Gazzam v. Armstrong, 3 Dana (33 Ky.) 554;
Eldredge v. Duncan, 1 B. M. (40 Ky.) 102;
Gano v. Finnell, 13 B. M. (52 Ky.) 390.

(*c*) An accommodation acceptor can not recover from the drawer where he knows that the drawer drew the instrument for accommodation and has no real interest therein.

Turner v. Browder, 5 Bush (68 Ky.) 217.

An accommodation maker is not released by an extension of the time of payment given without his consent, he being, under this section and under section 191, "the person primarily liable."

Nat. Citizens' Bank v. Toplitz, 81 N. Y. S., 422; 81 App. Div., 593.

Among the securities of a bank, there was found a note signed by its cashier as joint maker. The cashier, when asked about it, said that A was to indorse the note, and A was called in and indorsed it, receiving no consideration therefor. *Held,* that A was not an accommodation endorser for the bank after its purchase of the note. The cashier, having no authority to discount his own note for the bank, it did not accept the note until it was

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indorsed by A and the original consideration paid for the note attached to the instrument.

Bank of Monticello v. Dooly, 113 Wis., 590; 89 N. W., 490.

A note made for the payee's accommodation and discounted at an usurious rate can not be enforced against the maker; a sale of such a note is merely a loan from the buyer to the seller, and if at an usurious discount is invalid, and the transferee's want of knowledge that it was accommodation paper is immaterial.

Strickland v. Henry, 73 N. Y. S., 12; 66 App. Div., 23.

This rule will not apply in Kentucky, usury not making the instrument void; of course, the rate of discount may affect the question of the good faith of the transferee. See Nicholson v. Nat. Bank of New Castle, 92 Ky., 251; 13 K. L. R., 478; 17 S. W., 627; 16 L. R. A., 223.

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ARTICLE III.

NEGOTIATION.

Section 30. What constitutes negotiation; how made.
31. Indorsement; how made.
32. Indorsement must be of entire instrument.
33. Kinds of indorsement.
34. Special indorsement; indorsement in blank.
35. Blank indorsement; how changed to special indorsement.
36. When indorsement restrictive.
37. Effect of restrictive indorsement; rights of indorsee.
38. Qualified indorsement.
39. Conditional indorsement.
40. Indorsement of instrument payable to bearer.
41. Indorsement where payable to two or more persons.
42. Effect of instrument drawn or indorsed to a person as cashier, or other fiscal officer.
43. Indorsement where name is misspelled, *et cetera.*
44. Indorsement in representative capacity.
45. Time of indorsement; presumption.
46. Place of indorsement; presumption.

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3333-3353; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 30-50; Maryland, 49-69; New York, 61-80; Ohio, 3172b-3172v; Rhode Island, 38-58; Wisconsin, 1676-1676-20.

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47. Continuation of negotiable character.
48. Striking out indorsement.
49. Transfer without indorsement; effect of.
50. When prior party may negotiate instrument.

§ 30. **What Constitutes Negotiation; How Made.**—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof (*a*) if payable to bearer (*b*), it is negotiated by delivery (*c*); if payable to order (*d*), it is negotiated by the indorsement of the holder, completed by delivery (*e*).

Eaton and Gilbert, Com. Paper, 316. *Norton, B. & N.,* 130, 200, 204. *Randolph, Com. Paper,* §§ 689, 696.

(*a*) This sentence should evidently be read as if there were a period after the word "thereof."

(*b*) As to what instruments are payable to bearer, see sections 9, 34.

(*c*) "Delivery," see section 190.

(*d*) As to what instruments are payable to order, see section 8.

(*e*) Goddin v. Shipley, 7 B. M. (46 Ky.) 575;
Young v. Harris, 14 B. M. (53 Ky.) 447;
Louisville Coal Mining Co. v. International Trust Co., 71 P. (Colo.) 898.

§ 31. **Indorsement; How Made.**—The indorsement must be written on the instrument or upon a paper attached thereto (*a*). The signature of the indorser, without additional words, is a sufficient indorsement (*b*).

Eaton and Gilbert, Com. Paper, 320. *Norton, B. & N.,* 108.

(*a*) Traders' Deposit Bank v. Chiles, 14 K. L. R., 617.

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(*b*) Where there is attached to a bill of exchange a bill of sale for the goods for the price of which the bill of exchange was given, the signature of the payee to a memorandum written by him on the back of the draft, stating that the goods had been duly delivered, is not such an "indorsement" as will transfer title to the instrument, especially where it is followed by the printed statement, "Draft not good unless above bill of sale is signed, and draft also properly indorsed." Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky., 694; 22 K. L. R., 1333; 60 S. W., 537.

The question whether a writing on the instrument is an indorsement of it is a question of law for the court. *Ib;* but as to anomalous indorsers, see sections 63, 64.

§ 32. **Indorsement Must be of Entire Instrument.**—The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument (*a*); but where the instrument has been paid in part, it may be indorsed as to the residue (*b*).

Eaton and Gilbert, Com. Paper, 323. *Norton, B. & N.,* 113, 130.

(*a*) Bibb v. Skinner, 2 Bibb (5 Ky.) 57;
Elledge v. Straughn, 2 B. M. (41 Ky.) 81;
King v. King, 77 N. Y. S., 40; 73 App. Div., 547;
Bank of Galliopolis v. Trimble, 6 B. M. (45 Ky.) 599.
(*b*) Bledsoe v. Fisher, 2 Bibb (5 Ky.) 471.

§ 33. **Kinds of Indorsement.**—An indorsement may be either in blank or special, and it may also be either restrictive or qualified, or conditional.

Eaton and Gilbert, Com. Paper, 324. *Norton, B. & N.,* 119.

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§ 34. **Special Indorsement; Indorsement in Blank.**—A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so endorsed is payable to bearer, and may be negotiated by delivery (*a*).

Eaton and Gilbert, Com. Paper, 326. *Norton, B. & N.,* 110, 116.

(*a*) As to the warranty where the negotiation is by delivery only, see section 65.

§ 35. **Blank Indorsement; How Changed to Special Indorsement.**—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement (*a*).

Eaton and Gilbert, Com. Paper, 326. *Norton, B. & N.,* 110. *Randolph, Com. Paper,* § 708.

(*a*) Bradford v. Ross, 3 Bibb (6 Ky.) 239;
Gazzam v. Armstrong, 3 Dana (33 Ky.) 554;
Caruth v. Thompson, 16 B. M. (55 Ky.) 575;
Barret v. Fort Nat. Bank, 19 K. L. R., 611; 44 S. W., 97.
The right of the holder to fill up to himself a blank indorsement is not destroyed by the death of the indorser in blank. Cope v. Daniel, 9 Dana (39 Ky.) 418.

§ 36. **When Indorsement Restrictive.**—An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument (*a*); or

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2. Constitutes the indorsee the agent of the indorser (*b*); or
3. Vests the title in the indorsee in trust for or to the use of some other person (*c*). But the mere absence of words implying power to negotiate does not make an indorsement restrictive (*d*).

Eaton and Gilbert, Com. Paper, 328. *Norton, B. & N.,* 116, 124. *Randolph, Com. Paper,* § 410.

(*a*) For example, "Pay to A. only."

(*b*) For example, "For collection," "For deposit to my credit," "Pay to A. for my use," "Pay to A. for me." Armstrong v. Nat. Bank of Boyertown, 90 Ky., 431; 12 K. L. R., 393; 14 S. W., 411. The subsequent possession by the payee of a note (which was payable at a bank and had been indorsed by him to the cashier of another bank, and by that cashier indorsed to the cashier of the first bank), with the indorsement erased by lines drawn over them, rebuts all presumption that the note was assigned for any other purpose than that of collection. Caldwell v. Evans, 5 Bush (68 Ky.) 382.

As to the effect of a restrictive indorsement, see section 37.

(*c*) For example, "Pay A. for account of B." Such an instrument operates as notice that A. holds the instrument in trust for B. Menzies v. Farmers' Bank, 3 K. L. R., 822.

(*d*) Thus an instrument drawn to the order of A. and indorsed by him, "Pay to B.," continues to be negotiable, though the words, "Or order," are not included in the indorsement.

§ 37. **Effect of Restrictive Indorsement; Rights of Indorsee.**—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument (*a*).
2. To bring any action thereon that the indorser could bring (*b*).
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title

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of the first indorsee under the restrictive indorsement.

Eaton and Gilbert, Com. Paper, 332. *Norton, B. & N.,* 124, 215. *Randolph, Com. Paper,* § 410.

(*a*) A payment by the maker of a note indorsed by the payee to "the M. Bank for collection," and not further indorsed, is made at the maker's risk when paid to an unknown holder or stranger who had no right to collect it. Barnett v. Ringgold, 80 Ky., 289; 3 K. L. R., 781.

When a bank receives a draft or note for "collection on account," or, which is the same, "collection and credit," it does not owe the amount until collected; and, though credit be given therefor prior to collection, the bank may cancel such credit if the paper is dishonored. On the other hand, the owner of the paper is at liberty to treat the bank as agent until the proceeds are collected by the bank in money, and an entry of credit by the bank before it had actually received the money will not bind the owner. Armstrong v. National Bank of Boyertown, 90 Ky., 431; 12 K. L. R., 393; 14 S. W., 411.

(*b*) This qualifies, as to instruments indorsed "for collection," &c., section 18, Civil Code, requiring actions to be prosecuted in the name of the real party in interest.

§ 38. **Qualified Indorsement.**—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words, "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument (*a*).

Eaton and Gilbert, Com. Paper, 336. *Norton, B. & N.,* 119, 121.

(*a*) As to the warranty on a qualified indorsement, see section 65.

§ 39. **Conditional Indorsement.**—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make pay

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ment to the indorsee or his transferee, whether the condition has been fulfilled or not (*a*). But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

Eaton and Gilbert, Com. Paper, 337. *Norton, B. & N.,* 124.

(*a*) This changes the law-merchant under which the acceptor of a bill indorsed conditionally paid it at his peril if the condition was not fulfilled. If he dishonored the bill, he might be liable on damages, and yet it might be impossible for him to find out if the condition has been fulfilled. Robertson v. Kensington, 4 Taunt, 30.

§ 40. **Indorsement of Instrument Payable to Bearer.**—Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as to (*a*) make title through his indorsement (*b*).

Eaton and Gilbert, Com. Paper, 338. *Norton, B. & N.,* 116.

(*a*) "To" is meaningless here. The section should be read as though it were omitted.

(*b*) This section should be read in connection with sub-section 5 of section 9 and section 34. The rule established by these sections is: "An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer except as to the special indorser, who, on such an instrument, after such an indorsement, is only liable on his indorsement to such parties as make title through it" (Norton, B. & N., 116). Thus, if a note is made to A, by him indorsed in blank, then specially indorsed by B to C, then indorsed in blank by C, the holder can not recover of B unless he proves the signature of C; but as to the other parties the indorsement in blank would import right and possession, and only the signature of the indorser against whom recovery is sought would have to be proved.

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§ 41. **Indorsement Where Payable to Two or More Persons.**—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others (*a*).

Eaton and Gilbert, Com. Paper, 338. *Norton, B. & N.,* 133, 202.

(*a*) In Kentucky, the authority of an agent must be in writing. See section 19.

One of several joint executors has by law authority to indorse for the others; but his indorsement must be in the names of all.

Sanders v. Blain, 6 J. J. M. (29 Ky.) 446.

§ 42. **Effect of Instrument Drawn or Indorsed to a Person as Cashier or Other Fiscal Officer.**—Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Eaton and Gilbert, Com. Paper, 339. *Norton, B. & N.,* 67, 133.

§ 43. **Indorsement Where Name is Misspelled, Et Cetera.**—Where the names of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

Eaton and Gilbert, Com. Paper, 341. *Norton, B. & N.,* 133.

(*a*) The fact that the payee of a note, which runs to him indi-

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vidually, in assigning it describes himself as administrator of an estate, will not invalidate the assignment. McClure v. Bigstaff, 18 K. L. R., 601; 37 S. W., 294.

§ 44. Indorsement in Representative Capacity.—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability (*a*).

Eaton and Gilbert, Com. Paper, 341. *Norton, B. & N.,* 121.

(*a*) See section 20 as to the liability where the indorsement is made without qualification.

§ 45. Time of Indorsement; Presumption.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been affected (*a*) before the instrument was overdue (*b*).

Eaton and Gilbert, Com. Paper, 342.

(*a*) "Affected" is an evident mistake for "effected."

(*b*) Alexander v. Springfield Bank, 2 Met. (59 Ky.) 534. This presumption is important because, in order to constitute one a holder in due course, he must have taken the instrument before it was overdue. See section 52.

§ 46. Place of Endorsement; Presumption.—Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated (*a*).

Eaton and Gilbert, Com. Paper, 343.

(*a*) As an indorsement is a new contract, the place where it was made is often important. For example, an indorsement made

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in Ohio of a note made and payable in Kentucky, is governed by the law of Ohio.

Piner v. Clary, 17 B. M. (56 Ky.) 661;
Short v. Trabue, 4 Met. (61 Ky.) 301.

§ 47. **Continuation of Negotiable Character.**—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise (*a*).

Eaton and Gilbert, Com. Paper, 343. *Norton, B. & N.,* 116, 296.

(*a*) As to what will discharge the instrument, see sections 119-125.

§ 48. **Striking out Indorsement.**—The owner may at any time strike out any indorsement which is not necessary to his title (*a*). The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Eaton and Gilbert, Com. Paper, 346. *Norton, B. & N.,* 114.

(*a*) Bell v. Morehead, 3 Mar. (10 Ky.) 158;
Tuggle v. Adams, *Ib.*, 432;
Clark v. Schwing, 1 Dana (31 Ky.) 334;
Bank of Tennessee v. Smith, 9 B. M. (48 Ky.) 612.

Where the payee of a note indorses it to a bank for collection and it is returned to him protested for non-payment, he becomes an indorsee in possession and vested with the right of such indorsee. He may cancel the indorsement, and his mere possession of the note is sufficient to maintain an action thereon. *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 55 A. (Conn.) 604.

§ 49. **Without Transfer Indorsement; Effect of.**—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the

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transfer vests in the transferee such title as the transferrer had therein (*a*), and the transferee acquires, in addition, the right to have the indorsement of the transferrer (*b*).* But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Eaton and Gilbert, Com. Paper, 347. *Norton, B. & N.,* 134, 203.

(*a*) Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky., 694; 22 K. L. R., 1333; 60 S. W., 537.

A bank can not refuse to pay its certified check, drawn to order and transferred by delivery but not indorsed, there being no equities between the bank and the maker. *Meurer v. Phenix Nat. Bank,* 86 N. Y. S., 701; 88 N. Y. S., 83.

(*b*) As to the warranties on such a transfer, see section 65.

§ 50. **When Prior Party may Negotiate Instrument.**—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, re-issue and further negotiate the same (*a*); but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Eaton and Gilbert, Com. Paper, 352. *Norton, B. & N.,* 136.

(*a*) See section 47.

*The Colorado Act adds to this sentence the words, "if omitted by accident or mistake."

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ARTICLE IV.

RIGHTS OF HOLDER.

Section 51. Right of holder to sue; payment.
52. What constitutes a holder in due course.
53. When person not deemed holder in due course.
54. Notice before full amount paid.
55. When title defective.
56. What constitutes notice of defect.
57. Rights of holder in due course.
58. When subject to original defenses.
59. Who deemed holder in due course; burden of proof.

§ 51. **Right of Holder to Sue; Payment.**—The holder of a negotiable instrument may sue thereon in his own name (*a*), and payment to him in due course discharges the instrument (*b*).

Eaton and Gilbert, Com Paper, 358. *Norton, B. & N.,* 212, 296, 309. *Randolph, Com. Paper,* § 738.

(*a*) This applies to a holder to whom the instrument has been indorsed restrictively. See section 37, note (*c*). The payee, having again become holder of a note which he had indorsed in blank, negotiated at bank, and had taken up to save his credit as indorser, may sue upon it in his own name. Bradford v. Ross, 3 Bibb (6 Ky.) 239.

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3354-3362; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey. North Carolina, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 5-19; Maryland, 70-78; New York, 90-98; Ohio, 3172w-3173d; Rhode Island, 59-67; Wisconsin, 1676-21-1676-29.

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Mere possession of a note by an indorsee is sufficient evidence of ownership to support an action on it by him. *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 55 A. (Conn.) 604.

(*b*) One who has received payment of a certified check, but has repaid the money received thereon, can not maintain an action against the bank on its certification, the payment having discharged the check. *Poess v. Twelfth Ward Bank*, 86 N. Y. S., 857.

As to what constitutes payment in due course, see section 88.

§ 52. **What Constitutes a Holder in Due Course.**—A holder in due course is a holder who has taken the instrument under the following conditions (*a*):

1. That the instrument is complete and regular upon its face (*b*).
2. That he became the holder of it before it was overdue (*c*), and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value (*d*).
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it (*e*).

Eaton and Gilbert, Com. Paper, 359. *Norton, B. & N.*, 207, 309. *Randolph, Com. Paper*, § 674.

(*a*) This section is declaratory of the law as it is in Kentucky. Many of the Kentucky cases cited in the notes to sections 57, 58 and 59 bear on the subject treated in this section.

(*b*) Woolfolk v. Bank of America, 10 Bush (73 Ky.) 507. As to complete instruments and authority to fill blanks, see section 14.

(*c*) Woolfolk v. Bank of America, *supra*.
Greenwell v. Haydon, 78 Ky., 332.

(*d*) *Boston Steel & Iron Co. v. Steuer*, 183 Mass., 140; 66 N. E., 646.
Greeser v. Sugarman, 76 N. Y. S., 922; 37 Misc. Rep., 799;
Packard v. Windholz, 84 N. Y. S., 666;
Adkins v. Blake, 2 J. J. M. (25 Ky.) 41;
Greenwell v. Haydon, *supra*.

As to what constitutes value, see section 25, and as to presumption of consideration, section 24.

(*e*) Breckinridge v. Moore, 3 B. M. (42 Ky.) 636;

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Reid v. Cain, 3 K. L. R., 329;
Menzies v. Farmers' Bank, 3 K. L. R., 822;
Kelly v. Smith, 1 Met. (58 Ky.) 313;
Hargis v. Louisville Trust Co., 17 K. L. R., 218; 30 S. W., 877;
Moreland v. Citizens' Savings Bank, 97 Ky., 211; 17 K. L. R., 88; 30 S. W., 637;
Clark v. Tanner, 100 Ky., 275; 19 K. L. R., 590; 38 S. W., 11;
Beattyville Bank v. Roberts, 25 K. L. R., 1796; 78 S. W., 901.

As to what is necessary to constitute notice, see section 56.

Where the payee of a note, with knowledge of a defect in it, sells it to a holder in due course and then repurchases it, he can not recover on it.

Andrews v. Robertson, 111 Wis., 334; 87 N. W., 190; 54 L. R. A., 673.
Cline v. Templeton, 78 Ky., 550; 1 K. L. R., 276.

§ 53. **When Persons not Deemed Holder in Due Course.**—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course (*a*).

Eaton and Gilbert, Com. Paper, 367. *Norton, B. & N.,* 207, 309, 345.

(*a*) Where a note payable on demand was transferred eighteen months after its date, it will not be considered as overdue when transferred, since interest had been paid monthly to and after the transfer; and the transferee is a holder in due course. *McLean v. Bryer*, 24 R. I., 599, 54 A., 373.

As to what constitutes a reasonable time, see section 192.

§ 54. **Notice Before Full Amount Paid.**—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him (*a*).

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Eaton and Gilbert, Com. Paper, 373. *Norton, B. & N.,* 309, 326.

(*a*) Where a bank discounted a note by simply placing the proceeds to the credit of an indorser, and the note is dishonored at maturity by the maker and before the indorser had drawn the full amount to his credit, the maker may set up a failure of consideration as against the bank for the residue. *Albany County Bank v. People's Co-op. Co.,* 86 N. Y. S., 773.

§ 55. **When Title Defective.**—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.*

Eaton and Gilbert, Com. Paper, 374. *Norton, B. & N.,* 264, 270, 283, 309.

§ 56. **What Constitutes Notice of Defect.**—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith (*a*).

Eaton and Gilbert, Com. Paper, 367. *Norton, B. & N.,* 283, 309, 320.

*In the Wisconsin Act the following is added, "and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the ordinary care."

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(a) *Lucker v. Iba*, 66 N. Y. S., 1019; 54 App. Div., 566;
Citizens' Bank v. Rung Furniture Co., 78 N. Y. S., 604; 76 App. Div., 471;
Cline v. Templeton, 78 Ky., 550; 1 K. L. R., 276.

The statement in a note that it is executed for the purchase money of land and is secured by a vendor's lien is not sufficient to put a purchaser on inquiry.

Duncan v. Louisville, 13 Bush (76 Ky.) 378.
McCarty v. Louisville Banking Co., 100 Ky., 4; 18 K. L. R., 569; 37 S. W., 144.

Where the payees of a check, dated June 1st, drawn in and delivered to them in New York on the day of its date or the next day, were notified on June 4th that payment had been stopped because of failure of consideration, but, nevertheless, sent it to an agent in Kansas where it was in good faith discounted by a resident there on June 8th, there was no such delay as a matter of law to raise the presumption that the check was overdue or dishonored at the time of the discount. *Citizens' State Bank v. Cowles*, 80 N. Y. S., 598; 59 Misc. Rep., 571; 86 N. Y. S., 38.

In an action on a note by an indorsee thereof against the maker, a plea that the note had been procured by the fraud of the payee and delivered by him to the plaintiff in breach of faith, is insufficient in failing to aver that plaintiff took the note with knowledge of such fraud or breach of faith. *Black v. First Nat. Bank*, 96 Md., 399, 54 A., 88.

Where a bill drawn for the accommodation of the drawee before his insolvency was by him filled out with the name of the payee, and by the drawee accepted and delivered to the payee after the drawee had recently become insolvent, of which insolvency the payee knew when he took the note for an antecedent debt, the circumstances were sufficient to put the payee upon inquiry as to the good faith of the transaction, and it being the fact that the bill had been fraudulently diverted, to make the payee not a holder in due course. Thompson v. Poston, 1 Duv. (62 Ky.) 393.

Notice to a *bona fide* holder of a note that it was without consideration does not affect his right to recover on a renewal note given by the maker for a balance due the payee. Beattyville Bank v. Roberts, 25 K. L. R., 1796; 78 S. W., 901.

But mere suspicion of defect of title, or knowledge of circumstances that would excite suspicion in the mind of a prudent man, or gross negligence, short of bad faith, on the part of the taker at the time of transfer will not defeat his title.

Valley Savings Bank v. Mercer, 55 A. (Md.) 435.
Woolfolk v. Bank of America, 10 Bush (73 Ky.) 515.

One who takes notes of a corporation executed by one pro-

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fessing to act as its agent, takes the notes at his peril as to the authority of the agent. Chemical Nat. Bank v. Wagner, 93 Ky., 525; 14 K. L. R., 510; 20 S. W., 535; and where such paper is taken in payment of, or as security for, a personal debt of an agent or of an officer of the corporation, the act is *prima facie* unlawful.

Wisconsin Yearly Meeting, etc., v. Babler, 115 Wis., 289; 91 S. W., 678.

§ 57. **Rights of Holder in Due Course.**—A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves (*a*), and may enforce payment of the instrument for the full amount thereof (*b*) against all parties liable thereon.*

Eaton and Gilbert, Com. Paper, 381. *Norton, B. & N.,* 244, 283, 309, 317. *Randolph, Com. Paper,* §§ 737, 1885.

(*a*) *Black v. First Nat. Bank*, 96 Md., 399; 54 A., 88;
Jennings v. *Carlucci*, 87 N. Y. S., 475;
Goetting v. Day, 87 N. Y. S., 510;
Grey v. Bank of Kentucky, 2 Litt. (12 Ky.) 378;
Early v. McCart, 2 Dana (32 Ky.) 414;
Bement v. McClaren, 1 B. M. (40 Ky.) 298;
Pilcher v. Banks, 7 B. M. (46 Ky.) 550;
Caruth v. Thompson, 16 B. M. (55 Ky.) 575;
Jones v. Shelbyville Ins. Co., 1 Met. (58 Ky.) 62;
Kelly v. Smith, 1 Met. (58 Ky.) 316;
Spencer v. Biggs, 2 Met. (59 Ky.) 125;
Smith v. Lockridge, 8 Bush (71 Ky.) 427;
Woolfolk v. Bank of America, 10 Bush (73 Ky.) 514;
Reid v. Cain, 3 K. L. R., 329;
Bank of Marion v. Cassedy, 103 Ky., 363; 20 K. L. R., 64; 45 S. W., 110;
Coyne v. Anderson, 24 K. L. R., 2156; 73 S. W., 753;
Beattyville Bank v. Roberts, 25 K. L. R., 1796; 78 S. W., 901.

*In the Wisconsin Act, the following is added, "except as provided in sections 19-44 and 19-45 of these statutes, relating to insurance tiating such instrument is void under the provision of section 1676-25 of this Act."

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Mere illegality of the consideration in which the instrument originated does not affect it in the hands of a holder in due course. But where a statute, expressly or by necessary implication, declares the instrument to be void, it is void even in the hands of such holder.

Cochran v. German Ins. Bank, 9 K. L. R., 196;
Farmers' & Drovers' Bank v. Unser, 13 K. L. R., 965;
Bohon's Assignee v. Brown, 101 Ky., 357; 19 K. L. R., 540; 41 S. W., 273.

Examples of such void instruments in Kentucky are those which violate the statute concerning champerty and maintenance, gambling (including dealings in "futures"), contracts for the sale of public offices, illegal conspiracies, commonly called "trusts," sales of articles and rights by peddlers (Ky. Stats., sections 209, 211, 1955, 3741, 3918, 4223).

The illegality of a part only of the consideration vitiates the whole contract, except in case of usury, where the contract is void only as to the excess of interest above the legal rate (Ky. Stats., section 2219).

Brown v. Langford, 3 Bibb (6 Ky.) 500;
Burgen v. Straughan, 7 J. J. M. (30 Ky.) 583;
Donellan v. Lenox, 6 Dana (36 Ky.) 91;
Swan v. Chandler, 8 B. M. (47 Ky.) 98;
Gardner v. Maxey, 9 B. M. (48 Ky.) 90;
Collins v. Merrell, 2 Met. (59 Ky.) 164;
Kimbrough v. Lane, 11 Bush (74 Ky.) 556.

It is doubtful whether or not this section has changed the law in Kentucky as to negotiable instruments of the kind mentioned. In *Wirt v. Stubblefield*, 17 App. Cas. D. C., 283, it was held that the section changed the law of the District of Columbia, which was the same as that in Kentucky, as to a note given for a gambling debt in the hands of a holder in due course, the court saying:

"We know, moreover, that the great and leading object of the act, not only with Congress, but with the large number of the principal States of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have hitherto prevailed. The great object sought to be accomplished by the enactment of the statute is to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This

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clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute. . . ."

But, notwithstanding the strength of these arguments and the clear language of the section, there is great force in the objection that the statutes declaring such instruments void are founded on what the Legislature has for many years deemed to be sound public policy; and that in statutes or revisions condensing or in general re-stating the former law no change is presumed, except by imperative implication (*Endlich Interpretation of Statutes*, 127-205; *Sutherland on Statutory Construction*, section 156).

An indorser, however, of such an instrument is liable thereon to a holder in due course, since by his indorsement he warrants the validity of the instrument. (Section 66.)

(*b*) Hunt v. Armstrong, 5 B. M. (44 Ky.) 400;
McNamara v. Jose, 28 Wash., 461; 68 P., 903.

This provision has probably changed the law of Kentucky as to the amount of recovery by an indorsee from his immediate indorser, or by a payee from a drawer who has parted with the bill for less than the legal rate of discount. The statute treats the indorsement or transfer, not as a loan of money, but as the sale of a chattel with a warranty of its value at a future time. See Daniel, Neg. Inst. (5th Ed.) sections 767, 768, Norton, B. & N., 170-176, 244. Formerly in Kentucky an indorsement made on a discount at more than the legal rate of interest was treated as importing *per se* a direct usurious loan or a shift to evade the law against usury and the amount of recovery by the indorsee from his immediate indorser was limited to the money paid for the indorsement and legal interest thereon.

Metcalf v. Pilcher, 6 B. M. (45 Ky.) 529;
Pilcher v. Banks, 7 B. M. (46 Ky.) 551.

Where the transaction between indorsee and indorser is in fact a loan of money at an usurious rate, the excess over the legal rate can not be recovered.

See section 54 as to the effect of notice received by the purchaser before he has paid all of the consideration.

§ 58. **When Subject to Original Defenses.**—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable (*a*). But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such

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former holder in respect of all parties prior to the latter (*b*).*

Eaton and Gilbert, Com. Paper, 387, 87 N. W., 190. *Norton, B. & N.,* 309, 327. *Randolph, Com. Paper,* § 1879.

(*a*) *Black v. First Nat. Bank,* 96 Md., 399; 54 A., 88;
Lester v. Given, 8 Bush (71 Ky.) 360;
Greenwell v. Haydon, 78 Ky., 332;
Cline v. Templeton, 78 Ky., 550;
Greer v. Bentley, 19 K. L. R., 1251; 43 S. W., 219.
The defenses are not confined to those which are attached to the instrument. In Kentucky they include any defense, discount or set-off which the defendant has and might have used against the original obligee, or any intermediate assignor, before notice of the assignment. Ky. Stats., section 474. *Cf.,* Civil Code, section 19.)
(*b*) Feland v. Stirman, 15 K. L. R., 271. *Cf.,* section 26.

§ 59. **Who Deemed Holder in Due Course; Burden of Proof.**—Every holder is deemed *prima facie* to be a holder in due course (*a*); but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course (*b*). But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title (*c*).

Eaton and Gilbert, Com. Paper, 391. *Norton, B. & N.,* 309, 335.

(*a*) *Sutherland v. Mead,* 80 N. Y. S., 504; 80 App. Div., 103;
Bryan v. Harr, 21 App. D. C., 190;
Rice v. Hogan, 8 Dana (38 Ky.) 136;

*In the Wisconsin Act "duress" is inserted after "fraud," and "such holder" is substituted for "the latter."

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Byrne v. Schwing, 6 B. M. (45 Ky.) 204;
Crosthwait v. Misener, 13 Bush (76 Ky.) 543;
Hargis v. Louisville Trust Co., 17 K. L. R., 218; 30 S. W., 877;
McCarty v. Louisville Banking Co., 100 Ky., 4; 18 K. L. R., 569; 37 S. W., 144.

(*b*) *Mitchell v. Baldwin*, 84 N. Y. S., 1043;
Breckinridge v. Moore, 3 B. M. (42 Ky.) 636;
David v. Merchants' Nat. Bank, 103 Ky., 586; 20 K. L. R., 263; 45 S. W., 878.

The burden of proof can not be shifted except where the allegations in defense are of facts which would render the instrument sued on void from the beginning. McCarty v. Louisville Banking Co., *supra*.

That the payee is described as trustee does not let in defenses against a holder in due course. Prather v. Weissiger, 10 Bush (73 Ky.) 117-126.

When the evidence shows that the holder of a check accepted in payment of a pre-existing debt of his immediate assignor knew that it had been originally delivered on a condition which had not been fulfilled, and that payment had been stopped, the question whether he was a holder in due course is for the jury. *Groh's Sons v. Schneider*, 68 N. Y. S., 862; 34 Misc. N. Y., 195.

(*c*) Thus, if A. makes a note to B. and C. gets possession of it and fraudulently negotiates it to D., the fraud of C. is no defense to A. when sued on the note by D.

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ARTICLE V.

LIABILITIES OF PARTIES.

Section 60. Liability of maker.
61. Liability of drawer.
62. Liability of acceptor.
63. When person deemed indorser.
64. Liability of irregular indorser.
65. Warranty; where negotiation by delivery, *et cetera.*
66. Liability of general indorsers.
67. Liability of indorser where paper negotiable by delivery.
68. Order in which indorsers are liable; parol evidence.
69. Liability of agent or broker.

§ 60. **Liability of Maker.**—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse (*a*).

Eaton and Gilbert, Com. Paper, 399. *Norton, B. & N.,* 144.

(*a*) A note to a foreign corporation that had not complied with the Colorado law, without doing which it could not do business in the State, is valid against the maker in the hands of a holder in due course.

McMann v. Walker, 72 Pac. (Col.) 1055;
Nat. Bank of Commerce v. Pick, 99 S. E. (N. D.) 63.

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3363-3372; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 60-69; Maryland, 79-88; New York, 110-119; Ohio, 3173e-3173n; Rhode Island, 68-77; Wisconsin, 1677-1677-9.

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If the payee is a fictitious or non-existing person, the instrument is payable to bearer. Section 9.

"Capacity must be distinguished from authority. Capacity means power to contract so as to bind one's self. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of the law. Authority is derived from the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact." Chalmers, Bills of Exchange (5th Ed.) 60.

§ 61. **Liability of Drawer.**—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or* paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent† indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Eaton and Gilbert, Com. Paper, 403. *Norton, B. & N.,* 156.

§ 62. **Liability of Acceptor.**—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature (*a*), and his capacity and authority to draw the instrument (*b*); and

*"And" is substituted for "or" in the New York Act.
†"Subsequent" is omitted from the Colorado Act.

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2. The existence of the payee (*c*) and his then capacity to endorse.

Eaton and Gilbert, Com. Paper, 406. *Norton, B. & N.,* 144, 146. *Randolph, Com. Paper,* § 631.

(*a*) Deposit Bank of Georgetown v. Fayette Nat. Bank, 90 Ky., 10; 11 K. L. R., 803; 13 S. W., 339.

(*b*) The acceptor is the principal debtor. He is not a surety for the drawer, even though he accepted for accommodation only.

Anderson v. Anderson, 4 Dana (34 Ky.) 352;
McCandless v. Hadden, 9 B. M. (48 Ky.) 186;
Trimble v. City Nat. Bank, 12 K. L. R., 909; 15 S. W., 853.

The presumption is that the acceptor has funds of the drawer in his hands to meet the acceptance.

Ray v. Bank of Kentucky, 3 B. M. (42 Ky.) 512;
Byrne v. Schwing, 6 B. M. (45 Ky.) 203;
Turner v. Browder, 5 Bush (68 Ky.) 220.

But where the bill is drawn on a letter of credit to enable the drawer to purchase and ship goods, the presumption is rebutted and the drawer becomes the primary debtor and liable to the acceptor for his advances; and when the acceptor knows that one of the drawers is not beneficially interested and has merely loaned his name to give the bill currency, the acceptor has no more right to look to him than if he had merely indorsed it. Turner v. Browder, *supra.*

As the engagement of the acceptor is to pay the bill according to the tenor of his acceptance, he must pay to a holder in due course the amount called for by the bill at the time of his acceptance, even though larger than the original amount ordered by the drawer. This section, in extending the admission of the acceptor to the terms of the instrument itself, has changed the law. Daniel, Neg. Inst. (5th Ed.) sections 540, 1363.

It follows that a drawee who pays a raised bill, without acceptance, can not recover the excess paid from a holder in due course; nor can he recover it from the drawer unless the latter has by his conduct precluded himself from setting up the forgery. See notes to section 124.

(*c*) An instrument payable to a fictitious or non-existing person is payable to bearer. Section 9.

§ 63. **When Person Deemed Indorser.**—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an in-

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dorser (*a*), unless he clearly indicates by appropriate words his intention to be bound in some other capacity (*b*).

Eaton and Gilbert, Com. Paper, 412. *Norton, B. & N.,* 143. *Randolph, Com. Paper,* § 834.

(*a*) See section 17, sub-division 6.
McLean v. Bryer, 24 R. I., 599; 54 A., 373.
Where the members of a firm individually indorse a note executed by the firm, they are liable thereon as indorsers.
Faneuil Hall Nat. Bank v. Meloon, 183 Mass., 66; 66 N. E., 410.

(*b*) See Needhams v. Page, 3 B. M. (42 Ky.) 465.
Kellogg v. Dunn, 2 Met. (59 Ky.) 215;
Smith v. Lockridge, 8 Bush (71 Ky.) 423.
These cases relate to signatures on non-negotiable notes. The question as to the effect of such a signature on a negotiable instrument has not been decided in Kentucky.

§ 64. **Liability of Irregular Indorser.**—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules (*a*):

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties (*b*).
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Eaton and Gilbert, Com. Paper, 412. *Norton, B. & N.,* 139, 143. *Randolph, Com. Paper,* § 847.

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(*a*) The provisions of this section apply only to persons who indorse the instrument before delivery. *Kohn v. Cons. Butter and Egg Co.*, 63 N. Y. S., 265; 30 Misc. Rep., 725. Whether the true intention of indorsers, as between themselves, can be shown by oral evidence is doubtful. A *dictum* in the case just cited is to the effect that oral evidence is admissible; *contra*, Spencer v. Allerton, 60 Conn., 410; 22 A., 778; (decided under a similar act of 1884) which, as the statute fixes the liability absolutely, seems to be the correct view.

(*b*) *Metropolitan Bank v. Engel*, 72 N. Y. S., 691; 66 App. Div., 273.

§ 65. **Warranty; Where Negotiable by Delivery, Et Cetera.**—Every person negotiating an instrument by delivery (*a*) or by a qualified indorsement (*b*) warrants:

1. That the instrument is genuine and in all respects what it purports to be (*c*).
2. That he has a good title to it (*d*).
3. That all prior parties had capacity to contract (*e*).
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless (*f*).

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of sub-division three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes (*g*).

Eaton and Gilbert, Com. Paper, 418. *Norton, B. & N.,* 167, 169. *Randolph, Com. Paper,* § 753.

(*a*) As to what constitutes negotiation by delivery, see section 30.

(*b*) As to what is a qualified indorsement, see section 38.

(*c*) Hurst v. Chambers, 12 Bush (75 Ky.) 155;
Ware v. McCormack, 96 Ky., 139; 16 K. L. R., 385; 28 S. W., 157, 959.

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(*d*) Monarch Co. v. Farmers', etc., Bank, 105 Ky., 430; 20 K. L. R., 1351, 1788; 49 S. W., 317; 50 S. W., 33.

(*e*) Emerson v. Claywell, 14 B. M. (53 Ky.) 19.

(*f*) Such knowledge, for instance, as that the instrument had been paid before the time of transfer, Maupin v. Compton, 3 Bibb (6 Ky.) 215; or that the maker of the note was insolvent.

Markley v. Withers, 4 Mon. (20 Ky.) 15;

Cope v. Arberry, 2 J. J. M. (25 Ky.) 296.

The first three sub-sections of this section are merely declaratory of the existing law; but sub-section 4 has probably changed the law in these respects:

(1) The warranties mentioned are made part of the indorsement itself, and thus an indorser, though indorsing without recourse, is liable on the instrument itself on account of the warranties, and is so liable, as indorser, not only to his immediate indorsee, but also to subsequent holders. Heretofore the warranties mentioned were warranties implied from the sale of the instrument and were extrinsic to the indorsement (Meyer v. Richards, 163 U. S., 385; 16 Sup. Ct., 1148; 41 L. Ed., 199); and the liability of an indorser without recourse, on the warranties extended, like that of a transferrer by delivery, only to his immediate assignee (Doom v. Sherwyn, 20 Colo., 234; 38 P., 56), though on the last proposition the authorities are conflicting.

(2) The liability of a transferrer by delivery, or of an indorser without recourse, on the warranty of the *validity* of the instrument is limited to cases where the transferrer or indorser has knowledge of a fact which impairs its validity or renders it valueless, whereas the weight of authority was that such transfer or indorsement implied a warranty of the validity of the instrument, whether or not the transferrer or indorser had knowledge of the fact impairing its validity.

Johnson v. Welby, 2 B. M. (41 Ky.) 122;

Challis v. McCrum, 22 Kan., 157;

Giffert v. West, 33 Wis., 617;

Meyer v. Richards, *supra*. See Daniel, Neg. Inst. (5th Ed.) section 737.

(*g*) See Moore v. Worthington 2 Duv. (63 Ky.) 307.

§ 66. **Liability of General Indorser.**—Every indorser, who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in sub-divisions one, two and three of the next preceding section (*a*); and

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2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that, on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it (*b*.)

Eaton and Gilbert, Com. Paper, 424. *Norton, B. & N.,* 156, 162, 169. *Randolph, Com. Paper,* §§ 742, 752, 759.

(*a*) *Packard v. Windholz,* 84 N. Y. S., 666.

This section, like section 65, has probably changed the law in making the warranties part of the indorsement, instead of collateral obligations arising from the sale of the instrument, and in extending the indorser's liability on the warranties beyond his immediate vendee. So long as a warranty was a collateral obligation, an action might be brought on it without waiting for the maturity of the instrument; but now, although the warranty, if broken at all, is broken at the time of transfer, it seems that no action can be maintained on it until the maturity of the instrument.

(*b*) Callahan v. Bank of Kentucky, 82 Ky., 235.

§ 67. **Liability of Indorser Where Paper Negotiable by Delivery.**—Where a person places his endorsement on an instrument negotiable by delivery, he incurs all the liabilities of an indorser.

Eaton and Gilbert, Com. Paper, 429. *Norton, B. & N.,* 143.

§ 68. **Order in Which Indorsers are Liable; Parol Evidence.**—As respects one another, indorsers are liable *prima facie* in the order in which they in-

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dorse (*a*); but evidence is admissible to show that, as between or among themselves, they have agreed otherwise (*b*). Joint payees or joint indorsers who indorse are deemed to indorse jointly and severally (*c*).

Eaton and Gilbert, Com. Paper, 430. *Randolph, Com. Paper,* § 740.

(*a*) Hixon v. Reed, 2 Litt (12 Ky.) 175;
Eldridge v. Duncan, 1 B. M. (40 Ky.) 101;
Scott v. Doneghy, 17 B. M. (56 Ky.) 321;
Lewis v. Williams, 4 Bush (67 Ky.) 678.
The rule applies to accommodation indorsers, Denton v. Lyle, 4 Bush (67 Ky.) 597.
(*b*) Denton v. Lyle, *supra.*
Edelen v. White, 6 Bush (69 Ky.) 408.
(*c*) *Cf.*, Civil Code (Ky.) sections 26, 27.

§ 69. **Liability of Agent or Broker.**—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent (*a*).

Eaton and Gilbert, Com. Paper, 432. *Norton, B. & N.,* 170.

(*a*) Johnson v. Welby, 2 B. M. (41 Ky.) 122.

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ARTICLE VI.

PRESENTMENT FOR PAYMENT.

Section 70. Effect of want of demand on principal debtor; on drawer; on indorsers.
71. Presentment where instrument is not payable on demand; where payable on demand.
72. What constitutes a sufficient presentment.
73. Place of presentment.
74. Instrument must be exhibited.
75. Presentment where instrument payable at bank.
76. Presentment when person primarily liable is dead.
77. Presentment to persons liable as partners.
78. Presentment to joint debtors not partners.
79. When presentment not required to charge the drawer.
80. When presentment not required to charge the indorser.
81. When delay in making presentment is excused.
82. When presentment may be dispensed with.
83. When instrument dishonored by non-payment.
84. Liability of person secondarily liable, when instrument dishonored.

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3373-3391; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 70-88; Maryland, 89-107; New York, 130-148; Ohio, 3173o-3174*f*; Rhode Island, 78-96; Wisconsin, 1678-1678-18.

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85. Time of maturity; days of grace abolished; Sunday; holiday.
86. Time; how computed.
87. Rule where instrument payable at bank.
88. What constitutes payment in due course.

§ 70. **Effect of Want of Demand on Principal Debtor; on Drawer; on Indorsers.**—Presentment for payment is not necessary in order to charge the person primarily (*a*) on the instrument (*b*); but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers (*c*).

Eaton and Gilbert, Com. Paper, 439. *Norton, B. & N.,* 358, 367. *Randolph, Com. Paper,* § 1075.

(*a*) The word "liable" should be supplied. The person primarily liable is the person who by the terms of the instrument is absolutely required to pay the same. Section 191.

(*b*) McGowan v. Bank of Kentucky, 5 Litt (15 Ky.) 272;
Rice v. Hogan, 8 Dana (38 Ky.) 136;
Strader v. Bachelor, 8 B. M. (47 Ky.) 168.

(*c*) Baxter v. Graves, 2 Mar. (9 Ky.) 152;
Dodge v. Bank of Kentucky, *Ib.*, 610;
Taylor v. Bank of Illinois, 7 Mon. (23 Ky.) 576;
Hager v. Bosewell, 4 J. J. M. (27 Ky.) 62.

Where a bill is accepted at the request of the drawer who receives the proceeds thereof, presentment is not necessary to charge him. Barbaroux v. Waters, 3 Met. (60 Ky.) 304; in such case the drawer is the person primarily liable.

§ 71. **Presentment Where Instrument is not Payable on Demand; Where Payable on Demand.**—Where the instrument is not payable on demand, pre-

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sentment must be made on the day it falls due (*a*). Where it is payable on demand, presentment must be made within a reasonable time after its issue (*b*), except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Eaton and Gilbert, Com. Paper, 435. *Randolph, Com. Paper,* § 1108.

(*a*) Days of grace are abolished by section 85.

A Kentucky statute approved March 11, 1904 (Acts, 1904, page 80) and entitled, "An act in regard to the collection of checks and drafts," provides:

"That in order to hold the maker, indorser, guarantor, or surety of any check or draft deposited with or forwarded to any individual or bank for collection, or owned by any individual or bank, it shall be sufficient for said individual or bank to forward the same in the usual commercial way now in use, according to the regular course of business, and the same shall be considered due diligence in the collection of such check or draft."

It will be observed that this statute does not apply to promissory notes. As applied to checks and bills of exchange, its effect seems to be to provide that due diligence (as defined in the statute) in presentment for payment shall in all cases be sufficient to hold the drawer and indorsers. Such provision being inconsistent with the Negotiable Instruments Act, which was passed after the statute referred to, though at the same session, was repealed by the latter. (Sections 71, 82.)

The instrument need not be presented before it is due.

Taylor v. Bank of Illinois, 7 Mon. (23 Ky.) 580;
Landrum v. Trowbridge, 2 Met. (59 Ky.) 282;
Union Bank v. Marr, 6 Bush (69 Ky.) 616.

(*b*) Piner v. Clary, 17 B. M. (56 Ky.) 663;
Cawein v. Browinski, 6 Bush (69 Ky.) 460.

As against an indorser of a note payable on demand, demand made of the maker three months after the date of the note is not made within a reasonable time.

Merritt v. Jackson, 181 Mass., 69; 62 N. E., 987.

As an instrument negotiated when overdue is payable on demand (section 7), the provisions of section 71 apply in such cases.

As to the effect of failing to present a check within a reasonable time, see section 186. As to what constitutes a reasonable time, see section 192.

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§ 72. **What Constitutes Sufficient Presentment.**—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf (*a*).
2. At a reasonable hour on a business day (*b*).
3. At a proper place as herein defined (*c*).
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made (*d*).

Eaton and Gilbert, Com. Paper, 448. *Norton, B. & N.,* 351, 361.

(*a*) Mere possession of an instrument payable to the order of the payee and by him indorsed in blank, or of an instrument payable to bearer, is sufficient evidence of the right to present it and to demand payment. See section 59, note (*a*).

But as between the payee and the holder, the presumption of ownership by the holder does not arise where the instrument is not payable to bearer and is not indorsed by the payee.

Gano v. McCarthy, 79 Ky., 410.

(*b*) Stivers v. Prentice, 3 B. M. (42 Ky.) 463. As to the time of presentment of instruments payable in bank, see section 75.

(*c*) See section 73.

(*d*) But presentment is not necessary in order to charge the person primarily liable. See section 70.

§ 73. **Place of Presentment.**—Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented (*a*).
2. Where no place of payment is specified and the address of the person to make payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.

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4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Eaton and Gilbert, Com. Paper, 453. *Norton, B. & N.,* 353.

(*a*) McClane v. Fitch, 4 B. M. (43 Ky.) 600;
Bank of Kentucky v. Hickey, 4 Litt (14 Ky.) 226.
As to bills payable generally and accepted payable at a particular place, see section 140.
(*b*) Stivers v. Prentice, 3 B. M. (42 Ky.) 463.

§ 74. **Instrument Must be Exhibited.**—The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it.

Eaton and Gilbert, Com. Paper, 457. *Norton, B. & N.,* 338.

§ 75. **Presentment Where Instrument Payable at Bank.**—Where the instrument is payable at a bank (*a*), presentment for payment must be made during banking hours (*b*), unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient (*c*).

Eaton and Gilbert, Com. Paper, 459. *Norton, B. & N.,* 351.

(*a*) "Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not. Section 190.
In Kentucky, trust companies in counties having a population of more than one hundred thousand, can not engage in the business of banking (Ky. Stats., section 612). Therefore, where a note is

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made payable "at any bank in Louisville," presentment at the office of a trust company is not sufficient to charge the indorser. See Nash v. Brown, 165 Mass., 384; 43 N. E., 180.

(*b*) The maker has until the close of banking hours in which to pay, and is not in default if he deposits funds to meet the note within such hours, although after the presentation.

German Am. Bank v. Milliman, 65 N. Y. S., 242; 31 Mis. Rep., 87.

Presentment during banking hours is sufficient, though the bank be closed.

Metropolitan Bank v. Engel, 72 N. Y. S., 691; 66 App. Div., 273.

Presentment of a bill at a bank where it is payable, made after banking hours, where the regular officer and organ of the bank refuses payment, and the refusal is not made because the demand was too late, but because the acceptor had no funds, is sufficient.

Barbaroux v. Waters, 3 Met. (60 Ky.) 307.

(*c*) Where a note payable at a bank has been discounted by such bank, and is held by it at maturity, no presentment is necessary.

Huffaker v. Bank of Monticello, 13 Bush (76 Ky.) 649.

§ 76. **Presentment Where Person Primarily Liable is Dead.**—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

Eaton and Gilbert, Com. Paper, 461. *Norton, B. & N.,* 364. *Randolph, Com. Paper,* § 1085.

§ 77. **Presentment to Persons Liable as Partners.**—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Eaton and Gilbert, Com. Paper, 461. *Randolph, Com. Paper,* § 1086.

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§ 78. **Presentment to Joint Debtors not Partners.**—Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all (*a*).

Eaton and Gilbert, Com. Paper, 463. *Norton, B. & N.,* 364.

(*a*) Where presentment to all is impracticable, section 82 applies.

§ 79. **When Presentment not Required to Charge the Drawer.**—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument (*a*).

Eaton and Gilbert, Com. Paper, 464. *Norton, B. & N.,* 396.

(*a*) Humphries v. Bicknell, 2 Litt. (12 Ky.) 296;
Clarke v. Castleman, 1 J. J. M. (24 Ky.) 69;
Taylor v. Bank of Illinois, 7 Mon. (30 Ky.) 581;
Barbaroux v. Waters, 3 Met. (60 Ky.) 305.

The mere fact that the drawer had no funds in the hands of the drawee will not dispense with presentment. It is sufficient if the drawer had a reasonable expectation that the bill would be paid. The presumption is that the drawee has funds of the drawer in his hands.

Baxter v. Graves, 2 Mar. (9 Ky.) 152;
Frazier v. Harvie, 2 Litt. (12 Ky.) 185;
Ray v. Bank of Kentucky, 3 B. M. (42 Ky.) 512;
Byrne v. Schwing, 6 B. M. (45 Ky.) 203;
Slack v. Longshaw, 8 K. L. R., 166.

§ 80. **When Presentment not Required to Charge the Indorser.**—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation (*a*), and he has no reason to expect that the instrument will be paid if presented.

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Eaton and Gilbert, Com. Paper, 466. *Norton, B. & N.,* 183, 395. *Randolph, Com. Paper,* § 1067.

(*a*) Risk v. Bridgeford, 15 K. L. R., 206.

§ 81. **When Delay in Making Presentment is Excused.**—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence (*a*). When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Eaton and Gilbert, Com. Paper, 467. *Norton, B. & N.,* 398.

(*a*) See section 105.

§ 82. **When Presentment may be Dispensed with.**—Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence, presentment as required by this act can not be made.
2. Where the drawee is a fictitious person.
3. By waiver of presentment, express or implied (*a*).

Eaton and Gilbert, Com. Paper, 468. *Norton, B. & N.,* 398, 401.

(*a*) See notes to sections 109 and 111.

Shortly before the maturity of a note executed by a firm and indorsed by one of its members, the indorser informed the holder that the firm and its members were insolvent and that the note would not be paid, and consulted with holder concerning the firm's executing an assignment for the benefit of its creditors, which was executed before the maturity of the note, the indorser was held to have waived presentment. *In re Swift,* 106 F. (U. S. D. C. Mass.) 65.

(*b*) The indorser of a note payable on demand agreed with the holder, at the time of the indorsement, that the note should be a

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security for any debts contracted by the maker with the holder, and that the indorsement might be withdrawn at the end of four months if the indorser paid such debts. Before the end of four months, the holder informed the indorser of the amount of the then indebtedness and the indorser undertook to see the maker, and, if the latter did not pay, to "shut him up." *Held* that the holder was not relieved from presentment and notice of non-payment. *Congress Brewing Co. v. Habenicht*, 82 N. Y. S., 481; 83 App. Div., 141.

§ 83. **When Instrument Dishonored by Non-Payment.**—The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or can not be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

Eaton and Gilbert, Com. Paper, 472.

§ 84. **Liability of Person Secondarily Liable, when Instrument Dishonored.**—Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder (*a*).

Eaton and Gilbert, Com. Paper, 473. *Norton, B. & N.,* 367.

(*a*) The qualifying words, "subject to the provisions of this act," prevent the accrual of a *right of action* against parties entitled to notice of non-payment, until due notice is given.

§ 85. **Time of Maturity; Days of Grace Abolished; Sunday; Holiday.**—Every negotiable instrument is payable at the time fixed therein, without grace (*a*).* When the day of maturity falls upon Sun-

*The North Carolina Act provides that "the laws now in force in this State with regard to days of grace shall remain in force and shall not be construed to be repealed by this Act."

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day, or a holiday, the instrument is payable on the next succeeding business day (*b*).

Eaton and Gilbert, Com. Paper, 474. *Norton, B. & N.,* 77, 345, 350. *Randolph, Com. Paper,* §§ 1031, 1064.

(*a*) This has changed the law of Kentucky by abolishing days of grace.

A bill reading, "one hundred and eighty days, pay to the order of," is due one hundred and eighty days after date.

Moreland v. Citizens' Sav. Bank, 24 K. L. R., 1354; 71 S. W., 520.

(*b*) This also has changed the law of Kentucky, which in such cases made the instrument due on the preceding business day (Ky. Stats., section 2089*a*).

In Kentucky the holidays are: The first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, all days appointed by the President of the United States, or by the Governor of Kentucky, as days of fasting or thanksgiving, and the twenty-fifth day of December. Where a holiday falls on Sunday, the next succeeding day is treated as a holiday.

§ 86. **Time; How Computed.**—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

In Massachusetts an amendatory Act (Laws 1899, Ch. 130) restores days of grace on bills payable in that State at sight.

In Iowa, by an amendatory Act, demand may be made on any of the three days following maturity.

The New York Act provides that "instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday."

The Colorado Act provides "instruments falling due on any day in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours of the part of such day which is not a holiday.

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Eaton and Gilbert, Com. Paper, 479.

§ 87. **Instruments Payable at Bank; Right of Bank to Pay.**—Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon (*a*).

Eaton and Gilbert, Com. Paper, 480.

(*a*) As the maker of such a note is the principal debtor, presentment of it at the bank is not necessary in order to charge him (see section 70). The effect of this section is, not to convert a note into a check, thereby changing the liability of the maker, but only to impose an obligation on the bank at which it is made payable.

But the mere fact that the instrument is payable at a bank does not make the bank the agent of the payee to receive the money. To constitute such agency, the instrument must be indorsed to, or deposited with the bank for collection.

Caldwell v. Evans, 5 Bush (68 Ky.) 380.

Since the bank is not the agent of the payee to receive the money, it seems to follow that, apart from statute, it would not be authorized or obligated to pay the note for the maker. (See Grissom v. Commercial Bank, 87 Tenn., 350; 10 S. W., 75; 3 L. R. A., 273.) In this particular this section seems to have changed the law of Kentucky.

§ 88. **What Constitutes Payment in Due Course.**—Payment is made in due course when it is made at or after maturity of the instrument (*a*) to the holder thereof (*b*) in good faith and without notice that his title is defective.

Eaton and Gilbert, Com. Paper, 483. *Norton, B. & N.,* 296, 297.

(*a*) Payment to one of several joint payees extinguishes the rights of all.

Perry v. Perry, 98 Ky., 242; 17 K. L. R., 868; 32 S. W., 755.

(*b*) A payment by the maker, of a note indorsed by the payee to a named bank "for collection," to an unknown holder or stranger

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who had no right to collect it, does not discharge it. Had the note been indorsed in blank, or made payable to bearer, the case would be different.

Barnett v. Ringgold, 80 Ky., 289; 3 K. L. R., 781.

The instrument must be exhibited and, upon payment, surrendered (section 74). Daniel, Neg. Inst., sections 1227-1230.

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ARTICLE VII.

NOTICE OF DISHONOR.

Section 89. To whom notice of dishonor must be given.
90. By whom given.
91. Notice given by agent.
92. Effect of notice given on behalf of the holder.
93. Effect where notice is given by party entitled thereto.
94. Notice by agent when instrument dishonored in his hands.
95. When notice sufficient.
96. Form of notice; how notice delivered.
97. To whom notice may be given.
98. Notice where party is dead.
99. Notice to partners.
100. Notice to persons jointly liable not partners.
101. Notice to bankrupt or insolvent.
102. Time within which notice must be given.
103. Where parties reside in same place.
104. Where parties reside in different places.
105. When sender deemed to have given due notice by mail.
106. Deposit in post-office, what constitutes.
107. Notice to antecedent parties, time of.
108. To what place notice must be sent.

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3392-3421; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 89-118; Maryland, 108-137; New York, 160-189; Ohio, 3174*g*-3175; Rhode Island, 97-126; Wisconsin, 1678-19-1678-48.

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109. Waiver of notice.
110. Whom affected by waiver.
111. Waiver of protest is waiver also of presentment and notice.
112. When notice dispensed with.
113. Delay in giving notice; how excused.
114. When notice need not be given to drawer.
115. When notice need not be given to indorser.
116. Notice of non-payment where acceptance refused.
117. Effect of omission to give notice of non-acceptance.
118. When protest may be made; when must be made.

§ 89. **To Whom Notice of Dishonor Must be Given.**—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged (*a*).

Eaton and Gilbert, Com. Paper, 485. *Norton, B. & N.,* 368. *Randolph, Com. Paper,* § 1212.

(*a*) Lawrence v. Ralston, 2 Bibb (6 Ky.) 102;
McGowan v. Bank of Kentucky, 5 Litt. (15 Ky.) 272;
Higgins v. Morrison, 8 Dana (38 Ky.) 102;
Todd v. Edwards, 7 Bush (70 Ky.) 92;
Hayes v. Citizens' Savings Bank, 101 Ky., 201; 19 K. L. R., 367; 40 S. W., 573;
Murphy v. Citizens' Savings Bank, 110 Ky., 225; 22 K. L. R., 1672; 61 S. W., 25;
Brown v. Crofton, 25 K. L. R., 753; 76 S. W., 372.
As to when notice is dispensed with, see sections 109, 112, 114, 115.

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Notice of dishonor must be distinguished from protest. The protest is a formal paper setting forth the facts which constitute the dishonor of the instrument. Notice is the communication of the fact of dishonor. Only foreign bills must be protested in order to hold the parties secondarily liable. Any other negotiable instrument may be protested, not, however, because the protest is necessary in order to hold the parties secondarily liable, but in order to secure convenient evidence of the facts of presentment and dishonor. Whether protest is made or not, notice of dishonor must be given to a party secondarily liable, unless waived by him or excused under the law.

§ 90. **By Whom Given.**—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given (*a*).

Eaton and Gilbert, Com. Paper, 493. *Norton, B. & N.,* 381.

(*a*) An acceptor who has dishonored the bill by non-payment can not give notice as a party to the instrument; but, if authorized, he may give notice as agent for the holder. Sebree Deposit Bank v. Moreland, 96 Ky., 150; 16 K. L. R., 404; 28 S. W., 153. In the case cited, the authority of the acceptor seems to have been inferred from the fact that notices addressed to the drawer and to the indorser were mailed by the holder to the acceptor.

§ 91. **Notice Given by Agent.**—Notice of dishonor may be given by an agent (*a*) either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Eaton and Gilbert, Com. Paper, 495. *Norton, B. & N.,* 379.

(*a*) Stivers v. Prentice, 3 B. M. (42 Ky.) 461.

Sections 3723 and 3725 of the Kentucky Statutes, which are reenactments of an Act of January 16, 1864 and of sections 3 and 5, Ch. 79 of the General Statutes, read as follows:

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§ 3723. It shall be the duty of the notaries public of this Commonwealth to record in a well-bound and properly indexed book, kept by them for that purpose, all protests by them made for the non-acceptance or non-payment of all bills of exchange, checks or promissory notes, placed on the footing of the bills of exchange, and on which a protest is now required by law, or of the dishonor of which such protest is now evidenced by law, and a copy of such protest, certified by the said notary public under his notarial seal, shall be *prima facie* evidence in all the courts of this Commonwealth.

§ 3725. It shall hereafter be the duty of notaries public, upon protesting any of the instruments mentioned in section 3723, to give or send notice of the dishonor of such paper to such of the parties thereto are not required by law to be notified, to fix their liability on such paper; and when the residence of the parties is unknown to the notaries public and he shall send the notices to the holders of such paper, and he shall state in his protest the names of the parties to whom he sent or gave such notices, and the time and manner of giving the same, and such statement in such protest shall be *prima facie* evidence that such notices were sent or given as therein stated by such notary.

It seems clear that these sections have not been repealed by the Negotiable Instruments Law. Their application was confined to cases of protest of foreign bills of exchange (including foreign checks) and to such promissory notes as, under section 483 of the Kentucky Statutes had been placed on the footing of foreign bills of exchange, those being the only classes of instruments of which protest was required, or of which protest was evidence of dishonor.

Murry v. Claybourn, 2 Bibb (5 Ky.) 301;
Mills v. Rouse, 2 Litt. (12 Ky.) 301;
Read v. Bank of Kentucky, 1 Mon. (17 Ky.) 91;
Taylor v. Bank of Illinois, 7 Mon. (23 Ky.) 580;
Whiting v. Walker, 2 B. M. (41 Ky.) 262;
Chenowith v. Chamberlin, 6 B. M. (45 Ky.) 61;
Bank of U. S. v. Leathers, 10 B. M. (49 Ky.) 65;
Young v. Bennett, 7 Bush (70 Ky.) 478;
Murphy v. Citizens' Savings Bank, 22 K. L. R., 1672; 61 S. W., 25.

As the Negotiable Instruments Law does not place any promissory notes on the footing of bills of exchange (but, on the contrary, in sections 118 and 152, distinguishes them from bills of exchange in the matter of the necessity of protest) the application of the statutes quoted is now limited to protests of foreign bills, including foreign checks.

Apart from statute, it is no part of a notary's official duty to give notice of dishonor; but he may act as agent of the holder for the purpose of giving notice. Where, however, the notary in giving

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notice acts as agent, he is to be held to the same diligence as is required of his principal. As a notary can no longer give notice officially except in cases of protest of foreign bills, it follows that only in such cases can he excuse a want of diligence in giving the notice, and rely on his mere ignorance of the residence of the parties to be notified (Mulholland v. Samuels, 8 Bush (71 Ky.) 63) and send the notices to the holder of the instrument. In all other cases, the notice must be given within the time and in the manner prescribed by the Negotiable Instruments Law.

But where the instrument is dishonored in the hands of the notary acting as an agent, he, instead of giving the notice to the parties to be charged, may give it to his principal. See section 94. There seems to be no doubt that a notary may by contract impose on himself the obligations of an agent, above those of his office, in cases of foreign bills of exchange.

§ 92. **Effect of Notice Given on Behalf of Holder.**—Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right or (*a*) recourse against the party to whom it is given (*b*).

Eaton and Gilbert, Com. Paper, 497. *Norton, B. & N.,* 381.

(*a*) "Or" should be "of."

(*b*) The holder is not bound to give notice to any one but his immediate indorser. Lyddane v. Owensboro Banking Co., 106 Ky., 706; 21 K. L. R., 320; 51 S. W., 453.

§ 93. **Effect Where Notice is Given by Party Entitled Thereto.**—Where notice is given by or on behalf of a party entitled to given (*a*) notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given (*b*).

Eaton and Gilbert, Com. Paper, 498. *Norton, B. & N.,* 381.

(*a*) "Given" evidently means "give."

(*b*) Triplett v. Hunt, 3 Dana (33 Ky.) 126.

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§ 94. Notice by Agent When Instrument Dishonored in His Hands.—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder (*a*).

Eaton and Gilbert, Com. Paper, 497.

(*a*) Where the bill is remitted by the holder to the place of payment, the agent there may send notices to the holder to be served on those he holds responsible; but where the holder has intermediate agents for the purpose of forwarding to some other agent, who is to make the demand, he can not claim a day's delay at each place in order to give the agent there opportunity to notify the next in order that the bill has been presented. Slack v. Longshaw, 8 K. L. R., 166.

See section 91, note (*a*).

§ 95. When Notice Sufficient.—A written notice need not (*a*) be signed, and an insufficient written notice may be supplemented and validated by a written communication. A misdescription of the instrument does not vitiate (*b*) unless the party to whom the notice is given is in fact misled thereby (*c*).

Eaton and Gilbert, Com. Paper, 498. *Norton, B. & N.,* 373.

(*a*) This word is not in the Kentucky Act. It is supplied from the context.

(*b*) The word "it" is evidently omitted.

(*c*) A failure to state the name of the holder or owner is immaterial. Shrieve v. Duckham, 1 Litt. (11 Ky.) 194.

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§ 96. **Form of Notice; How Notice Delivered.**—The notice may be in writing (*a*), and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment (*b*). It may in all cases be given by delivering it personally (*c*) or through the mails (*d*).

Eaton and Gilbert, Com. Paper, 500. *Norton, B. & N.,* 373, 374, 376, 385.

(*a*) This section, as adopted in other States, contains after "writing" the words, "or merely oral." It is not likely that the omission changes the law in Kentucky which permits oral notice.

Lawrence v. Ralston, 3 Bibb (6 Ky.) 102;

Bank of Kentucky v. Brooking, 2 Litt. (12 Ky.) 44.

The safer course, for many reasons, is to give notice in writing.

The notice must show presentment and refusal to accept or to pay. Young v. Bennett, 7 Bush (70 Ky.) 474.

(*b*) Rudd v. Deposit Bank, 105 Ky., 443; 20 K. L. R., 1276; 49 S. W., 207.

A notary's certificate of protest under his seal, stating that on request of the holder of the note "of which the above is a true and complete copy," he presented it for payment, that payment was refused, that he protested it and served notice of protest of "the above mentioned note" on the indorsers by depositing copies in the postoffice, sufficiently identifies the note and shows its protest for non-payment; and the notice is sufficient to bind an indorser, it being presumed that the notice was that the note had been protested for non-payment.

Second Nat. Bank v. Smith, 94 N. W. (Wis.) 664.

(*c*) A delivery of the notice at the residence of an indorser to a member of his family, or to any one residing with him, of sufficient age and discretion to take care of it is to be regarded as a delivery to the indorser; and if there was no one on the premises to receive it, leaving it at the place is sufficient.

Bank of Kentucky v. Duncan, 4 Bush (67 Ky.) 294.

(*d*) The provision permitting delivery through the mail where the parties reside in the same place, changes the law in Kentucky.

Todd v. Edwards, 7 Bush (70 Ky.) 89;

Neal & Co. v. Taylor, 9 Bush (72 Ky.) 380;

See Ky. Stats., § 3725, and *ante,* section 91, note (*a*).

As to what is a sufficient delivery by mail, see section 106.

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§ 97. **To Whom Notice May be Given.**—Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Eaton and Gilbert, Com. Paper, 489. *Norton, B. & N.,* 383.

§ 98. **Notice Where Party is Dead.**—Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Eaton and Gilbert, Com. Paper, 490. *Norton, B. & N.,* 383.

§ 99. **Notice to Partners.**—Where the parties to be notified are partners, notice to any one partner is notice to the firm (*a*), even though there has been a dissolution.

Eaton and Gilbert, Com. Paper, 491. *Norton, B. & N.,* 383.

(*a*) Citizens' Savings Bank v. Hayes, 96 Ky., 365; 16 K. L. R., 505; 29 S. W., 20. Where one partner is the cashier of the bank which holds the note of his firm, he is presumed to have notice of its non-payment. Hayes v. Citizens' Savings Bank, 101 Ky., 201; 19 K. L. R., 367; 40 S. W., 573.

§ 100. **Notice to Persons Jointly Liable Not Partners.**—Notice to joint parties who are not partners must be given to each of them (*a*), unless one of them has authority to receive such notice for the others.

Eaton and Gilbert, Com. Paper, 492. *Norton, B. & N.,* 383.

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(*a*) This has changed the rule in Kentucky, which was that a notice to any of the joint indorsers was notice to all. Dodge v. Bank of Kentucky, 2 Mar. (9 Ky.) 615; Higgins v. Morrison, 4 Dana (34 Ky.) 105.

§ 101. **Notice to Bankrupt or Insolvent.**—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself (*a*) or to his trustee or assignee (*b*).

Eaton and Gilbert, Com. Paper, 493. *Norton, B. & N.,* 383.

(*a*) Moreland v. Citizens' Savings Bank, 24 K. L. R., 1354; 71 S. W., 520.

(*b*) Callahan v. Bank of Kentucky, 82 Ky., 231; 6 K. L. R., 188.

§ 102. **Time Within Which Notice must be Given.**—Notice may be given as soon as the instrument is dishonored (*a*), and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Eaton and Gilbert, Com. Paper, 502. *Norton, B. & N.,* 390.

(*a*) A bill payable on a certain day after its date need not be presented for acceptance until it becomes due; yet if it is presented before the time and dishonored, the holder is bound to give notice to those whom he intends to hold bound. Taylor v. Bank of Illinois, 7 Mon. (23 Ky.) 580;
Smith v. Roach, 7 B. M. (46 Ky.) 18;
Bank of Tenn. v. Smith, 9 B. M. (48 Ky.) 610;
Landrum v. Trowbridge, 2 Met. (59 Ky.) 282;
Union Nat. Bank v. Marr, 6 Bush (69 Ky.) 616.

§ 103. **Where Parties Reside in Same Place.**—Where the person giving and the person to receive no-

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tice reside in same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following (*a*).
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post-office in time to reach him in the usual course on the day following.

Eaton and Gilbert, Com. Paper, 505. *Norton, B. & N.,* 390.

(*a*) The rule in Kentucky has been that the notice must be given within a reasonable time. A notice delivered or mailed (in cases where notice could be legally given through the mail) on the day of dishonor or on the day following, is given within a reasonable time. Ralston v. Bullitt, 3 Bibb (6 Ky.) 261;
Noble v. Bank of Kentucky, 3 Mar. (10 Ky.) 264;
Bank of Frankfort v. Markley, *Ib.*, 505;
Shrieve v. Duckham, 1 Litt. (11 Ky.) 195;
Bank of Kentucky v. Eades, *Ib.*, 277;
Pearson v. Duckham, 3 Litt. (13 Ky.) 386;
Hickman v. Ryan, 5 Litt. (15 Ky.) 24;
Stivers v. Prentice, 3 B. M. (42 Ky.) 463;
Mitcherson v. Grays, 4 B. M. (43 Ky.) 399;
McClane v. Fitch, 4 B. M. (43 Ky.) 600;
Monarch Co. v. Farmers' & Traders' Bank, 105 Ky., 430; 20 K. L. R., 1351; 49 S. W., 17.

Where the bill is remitted by the holder to the place of payment, the agent there may send notices to the holder to be served on those he holds responsible; but where the holder has intermediate agents for the purpose of forwarding to some other agent, who is to make the demand, he can not claim a day's delay at each place in order to give the agent there opportunity to notify the next in order that the bill has been protested. Slack v. Longshaw, 8 K. L. R., 166.

§ 104. **Where Parties Reside in Different Places.**—Where the person giving and the person to receive

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notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter (*a*).
2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last sub-division (*b*).

Eaton and Gilbert, Com. Paper, 506. *Norton, B. & N.,* 392.

(*a*) See note (*a*) to section 103.

(*b*) Where notice of protest is delivered by a special messenger other than through the regular mail, it must distinctly appear when it was delivered, so as to enable the court to say that it was delivered as soon as it could have reached the party sought to be charged by due course of mail. Therefore, where drawers and indorsers are sought to be made liable upon notice delivered to them by the acceptor, it is not sufficient to allege that notice for them was on a certain day (which was in time) mailed to the acceptor, and "at once" delivered by him to them, as it can not be inferred, for the purpose of holding liable any other person than the one to whom notice was addressed, that it was received in due course of mail. Sebree Deposit Bank v. Moreland, 96 Ky., 150; 16 K. L. R., 404; 28 S. W., 153.

§ 105. **Where Sender Deemed to Have Given Due Notice by Mail.**—Where notice of dishonor is duly addressed (*a*) and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails (*b*).

Eaton and Gilbert, Com. Paper, 515.

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(*a*) Proof that notice was put in the postoffice at the town where the note was discounted, without showing where or to whom it was addressed, is insufficient. McGowan v. Bank of Kentucky, 5 Litt. (15 Ky.) 272.

Notice directed to defendant at Union Co., Ky., where there were two postoffices in the county, one at the court-house, near which the defendant resided, and the other eight miles distant, was held insufficient. Taylor v. Bank of Ill., 7 Mon. (23 Ky.) 583.

(*b*) *State Bank v. Soloman*, 84 N. Y. S., 976.

§ 106. **Deposit in Postoffice; What Constitutes.**—Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the Postoffice Department (*a*).

Eaton and Gilbert, Com. Paper, 516. *Norton, B. & N.,* 388.

(*a*) Delivery to a letter carrier is not sufficient under this section.

§ 107. **Notice to Antecedent Party; Time of.**—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor (*a*).

Eaton and Gilbert, Com. Paper, 511. *Norton, B. & N.,* 392.

(*a*) Triplett v. Hunt, 3 Dana (33 Ky.) 127. Smith v. Roach, 7 B. M. (46 Ky.) 17. See section 103, note (*a*).

§ 108. **To What Place Notice Must be Sent.**—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either in the postoffice nearest to his place of resi-

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dence, or to the postoffice where he is accustomed to receive his letters (*a*); or

2. If he lives in one place and has his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is sojourning (*b*).

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section (*c*).

Eaton and Gilbert, Com. Paper, 517. *Norton, B. & N.,* 389.

(*a*) Where the notary giving notice, not knowing the residence or place of business of any of the indorsers except the last, forwarded all the notices to him, and the indorser immediately forwarded them to prior indorsers, such notice is sufficient as to the prior indorsers. *Metropolitan Bank v. Engel,* 72 N. Y. S., 691; 66 App. Div., 273.

Notice addressed to an indorser at a place owned by him, and where his sons did business, but which was not his place of business or residence, was insufficient, he not having received it.

Ebling Brewing Co. v. Rheinheimer, 66 N. Y. S., 458; 32 Misc. Rep., 594;

Bondurant v. Everett, 1 Met. (58 Ky.) 660.

The fact that the indorser was known to be absent from his residence does not excuse a failure to give notice. Lawrence v. Ralston, 3 Bibb (6 Ky.) 102.

In the absence of notice to the contrary, the holder may presume that the residence of the drawer or indorser continues to be where it was at the time of the drawing or indorsing by him.

Menzies v. Farmers' Bank, 3 K. L. R., 822;

Mohlman Co. v. McKane, 69 N. Y. S., 1046; 60 App. Div., 546.

(*b*) McClain v. Waters, 9 Dana (39 Ky.) 56.

(*c*) Moreland v. Citizens' Savings Bank, 97 Ky., 211; 17 K. L. R., 88; 30 S. W., 637.

Monarch Co. v. Farmers, &c., Bank, 105 Ky., 440; 20 K. L. R., 1351; 49 S. W., 317.

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§ 109. **Waiver of Notice.**—Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice (*a*), and the waiver may be express or implied (*b*).

Eaton and Gilbert, Com. Paper, 518. *Norton, B. & N.,* 401.

(*a*) "Accurately speaking, there can only be a waiver of demand and notice by an indorser before the maturity of the instrument; nevertheless the indorser can waive due proof of the demand and of the fact that the instrument has been dishonored, or, what is more to the purpose, he can so act toward the holder of the instrument as to render the fact that demand was not made or notice was not given wholly immaterial." (Eaton and Gilbert, *supra.*) In Kentucky, however, it has been held that a new promise to pay by a drawer or indorser who had been released by a want of presentment or notice must be founded on a new and valuable consideration, and that where such consideration is given the action must be on the new promise and not on the original instrument. Lawrence v. Ralston, 3 Bibb (6 Ky.) 102;

Ralston v. Bullitt, *Ib.*, 263;
Ray v. Bank of Kentucky, 3 B. M. (42 Ky.) 513;
Bank of Tennessee v. Smith, 9 B. M. (48 Ky.) 610;
Bank of U. S. v. Leathers, 10 B. M. (49 Ky.) 64;
Landrum v. Trowbridge, 2 Met. (59 Ky.) 283;
McCracken v. Covington Nat. Bank, 4 K. L. R., 264;
Sebree Deposit Bank v. Moreland, 96 Ky., 150; 16 K. L. R., 404; 28 S. W., 153;
Murphy v. Citizens' Savings Bank, 110 Ky., 225; 22 K. L. R., 1672; 61 S. W., 25;

The section under consideration has changed the law of Kentucky in this particular.

The promise, however, must be made with knowledge that the instrument was not presented, and that notice was not given and it must be clear and unequivocal. (See Daniel Neg. Instruments, sections 1147-1168.) The making of a promise after non-payment raises a presumption that notice had been duly given; but where the instrument has been dishonored for non-acceptance there is no inference that a party to whom promises to pay after the bill falls due would have known of the refusal to accept or of the failure to give notice of non-acceptance, and in such cases the promise to pay would not in itself be a waiver of the laches or

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presumptive evidence of diligence. Bank of Tennessee v. Smith; Landrum v. Trowbridge; Sebree Deposit Bank v. Moreland, *supra*.

(*b*) The waiver may be either oral or written.
Bank of U. S. v. Leathers, 10 B. M. (49 Ky.) 64;
Maples v. Traders' Deposit Bank, 15 K. L. R., 879.

§ 110. **Whom Affected by Waiver.**—Where the waiver is embodied in the instrument itself, it is binding upon all parties (*a*); but where it is written above the signature of an indorser, it binds him only (*b*).

Eaton and Gilbert, Com. Paper, 524. *Norton, B. & N.,* 371, 401.

(*a*) Bryant v. Merchants' Bank, 8 Bush (71 Ky.) 44;
Smith v. Lockridge, *Ib.*, 431.

(*b*) A waiver printed on the back of the instrument binds the indorser, though not signed by him, and entirely disconnected from the indorsement to which his signature appears; and parol evidence is not admissible against the holder to show that the indorser did not intend to be bound by it. Farmers' Bank v. Ewing, 78 Ky., 264.

§ 111. **Waiver of Protest is Waiver also of Presentment and Notice.**—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor.

Eaton and Gilbert, Com. Paper, 525. *Norton, B. & N.,* 401. *Randolph, Com. Paper,* § 1366.

§ 112. **When Notice is Dispensed with**—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged (*a*).

Eaton and Gilbert, Com. Paper, 526. *Norton, B. & N.,* 398.

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(*a*) Where there is no dispute as to the facts, the question whether the time is reasonable is for the court.

Noble v. Bank of Kentucky, 3 Mar. (10 Ky.) 264;
Dodge v. Bank of Kentucky, *Ib.*, 616.

Where the holder does not know where the indorser lives, but can ascertain his residence with reasonable effort, he must do so. *Fonseca v. Hartman*, 84 N. Y. S., 131.

In Kentucky the statute (Ky. Stats., section 3725) does not require the notary protesting foreign bills or checks to make inquiry as to the residence of the person to be notified. Mulholland v. Samuels, 8 Bush (71 Ky.) 65. Neal v. Taylor, 9 Bush (72 Ky.) 380. In such cases, where the residence of the party to be notified is unknown to the notary, it is his duty to forward the notice to the holder before the expiration of business hours of the day after the protest. Neal v. Taylor, *supra*. See on this subject, *ante*, section 91, note (*a*).

§ 113. **Delay in Giving Notice; How Executed.**—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Eaton and Gilbert, Com. Paper, 504. *Norton, B. & N.,* 398. *Randolph, Com. Paper,* § 1320.

§ 114. **When Notice Need Not be Given to Drawer.**—Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and the drawee are the same person (*a*).
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument (*b*).

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5. Where the drawer has countermanded payment.

Eaton and Gilbert, Com. Paper, 528. *Norton, B. & N.,* 396, 397. *Randolph, Com. Paper,* §§ 1341, 1346, 1385.

(*a*) The maker of a note payable to his own order and indorsed by him is not entitled to notice. Pace v. Welmending, 12 Bush (75 Ky.) 142.

An accommodation maker of a note, signing jointly with the principal maker is not entitled to notice. Marion Nat. Bank v. Phillips, 18 K. L. R., 159; 35 S. W., 910.

(*b*) Humphries v. Bicknell, 2 Litt. (12 Ky.) 296;
Taylor v. Bank of Illinois, 7 Mon. (30 Ky.) 581;
Clarke v. Castleman, 1 J. J. M. (24 Ky.) 69;
Barbaroux v. Waters, 3 Met. (60 Ky.) 305.

The mere fact that the drawer had no funds in the hands of the drawee will not dispense with presentment. It is sufficient if the drawer had a reasonable expectation that the bill would be paid. The presumption is that the drawee has funds of the drawer in his hands.

Baxter v. Graves, 2 Mar. (9 Ky.) 152;
Frazier v. Harvie, 2 Litt. (12 Ky.) 185;
Ray v. Bank of Kentucky, 3 B. M. (42 Ky.) 512;
Byrne v. Schwing, 6 B. M. (45 Ky.) 203;
Slack v. Longshaw, 8 K. L. R., 166.

§ 115. **When Notice Need Not be Given to Indorser.**—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person, or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument (*a*).
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted for his accommodation (*b*).

Eaton and Gilbert, Com. Paper, 529. *Norton, B. & N.,* 183, 395. *Randolph, Com. Paper,* §§ 1341, 1354.

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(*a*) *In re Swift*, 106 F., 65.
(*b*) Risk v. Bridgeford, 15 K. L. R., 206. See section 80.

§ 116. **Notice of Non-Payment Where Acceptance Refused.**—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Eaton and Gilbert, Com. Paper, 530. *Randolph, Com. Paper,* § 1323.

§ 117. **Effect of Omission to Give Notice of Non-Acceptanec.** —An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.*

Eaton and Gilbert, Com. Paper, 530.

§ 118. **When Protest May be Made; When Must be Made.**—Where any negotiable instrument has been dishonored, it may be protested for non-acceptance or non-payment as the case may be; but protest is not required, except in the case of foreign bills of exchange (*a*).

Eaton and Gilbert, Com. Paper, 530. *Norton, B. & N.,* 371.

(*a*) This section has changed the law in Kentucky. Formerly only foreign bills of exchange and such promissory notes as under section 483, Kentucky Statutes, had been placed on the footing of foreign bills, were required to be protested; and a certificate of

*The Wisconsin Act contains the following additional provision, "but this shall not be construed to revive any liability discharged by such omission."

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protest of an instrument of which protest was not required by law was not of itself evidence of dishonor.

Murray v. Claybourn, 2 Bibb (5 Ky.) 301;
Mills v. Rouse, 2 Litt. (12 Ky.) 301;
Read v. Bank of Kentucky, 1 Mon. (17 Ky.) 91;
Taylor v. Bank of Illinois, 7 Mon. (23 Ky.) 580;
Whiting v. Walker, 2 B. M. (41 Ky.) 262;
Chenowith v. Chamberlin, 6 B. M. (45 Ky.) 61;
Bank of U. S. v. Leathers, 10 B. M. (49 Ky.) 65;
Young v. Bennett, 7 Bush (70 Ky.) 478;
Murphy v. Citizens' Savings Bank, 22 K. L. R., 1672, 1872; 61 S. W., 25; 62 S. W., 1028.

Although under this section protest is not necessary except as to foreign bills, it is permissible and advisable as to all instruments because it affords the easiest and most certain method of proving the facts of dishonor and notice, the certificate of the notary being *prima facie* evidence of these facts (Ky. Stats., sections 479, 3723, 3725, 3736).

As to what are foreign bills, see section 129.

As to protest generally, see sections 152-160.

Protest should be distinguished from notice of dishonor. See note (*a*) to section 89.

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ARTICLE VIII.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

Section 119. How instrument discharged.
120. When person secondarily liable on, discharged.
121. Right of party secondarily liable who pays instrument.
122. Renunciation by holder.
123. Cancellation, unintentional; burden of proof.
124. Alteration of instrument; effect of.
125. What constitutes a material alteration.

§ 119. **How Instrument Discharged.**—A negotiable instrument is discharged:

1. By payment (*a*) in due course (*b*) by or on behalf of the principal debtor (*c*).
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder (*d*).
4. By any other act which will discharge a simple contract for the payment of money (*e*).
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right (*f*).

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3422-3428; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 119-125; Maryland, 138-144; New York, 200-206; Ohio, 3175*j*-3175*p*; Rhode Island, 127-133; Wisconsin, 1679-1679-6.

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Eaton and Gilbert, Com. Paper, 532. *Norton, B. & N.,* 183, 295, 296, 302.

(*a*) A note in the hands of the maker indorsed by the payee is presumed to have been paid (Ellis v. Blackerby, 25 K. L. R., 1557; 78 S. W., 181); and one to whom the maker discounts it, to recover against the indorser, must overcome this presumption by showing, for example, that the indorsement was made for the maker's accommodation. Long v. Bank of Cynthiana, 1 Litt. (11 Ky.) 290;

Callahan v. First Nat. Bank, 78 Ky., 604; 1 K. L. R., 342;

Callahan v. Bank of Kentucky, 82 Ky., 231; 6 K. L. R., 188.

(*b*) As to what constitutes payment in due course, see section 88 and section 59, note (*a*).

(*c*) Thus, a payment by an indorser made not as agent for the maker but in discharge of his own obligation, does not discharge the maker. Bowman v. Wright, 7 Bush (70 Ky.) 377.

(*d*) See section 123 as to effect of unintentional cancellation.

(*e*) As, for example, the acceptance of a chattel in satisfaction before maturity. This sub-section must be construed in connection with the context and with section 57. It evidently relates to acts between the parties, and can not fairly be construed to mean that the holder's acceptance of a chattel in satisfaction, before maturity, discharges the maker as against a subsequent holder in due course.

The sale and assignment of a note of two obligors to a firm of which one of them was a member extinguishes the debt as to both.

Logan County Nat. Bank v. Barclay, 104 Ky., 97; 20 K. L. R., 773; 46 S. W., 675.

(*f*) If he becomes the holder in a representative capacity, the instrument is not discharged. Section 3889, Ky. Stats., has changed the common-law rule that the appointment of a debtor as executor of the creditor discharges the debt.

Under this sub-section and sections 190, 191 a demand note is discharged and the maker released when the holder upon payment of part of the amount voluntarily surrenders it to the maker, though the maker promises at the time to pay the balance. *Schwartzman v. Post,* 84 N. Y. S., 922. It does not follow that an action could not be maintained against the maker on the original indebtedness, or on the promise to pay the balance.

§ 120. **Where Person Secondarily Liable Discharged.**—A person secondarily liable (*a*) on the instrument is discharged:

1. By an act which discharges the instrument.

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2. By the intentional cancellation of his signature by the holder (*b*).
3. By the discharge of a prior party (*c*).
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved (*d*).
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved in the original instrument (*e*).*

Eaton and Gilbert, Com. Paper, 544. *Norton, B. & N.,* 295, 304, 305, 308.

(*a*) As to what parties are secondarily liable, see section 191.

(*b*) As to unintentional cancellation, and as to burden of proof in cases of cancellation, see section 123.

(*c*) The meaning of this sub-section, considered without reference to the context or to the existing law, is obscure. It may be construed to mean that if notice should not be given by the holder to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged, or that the discharge of a prior party by operation of law discharges subsequent parties; but the absurdity of these results, the context and well-settled rules of statutory construction, leave little room for question that the proper construction is that the discharge referred to is a discharge by the act of the holder, and that this section does not change the well-settled rule that the discharge

*In the Wisconsin Act, the following is substituted for subdivision 6, "by an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent, prior or subsequent, of the party secondarily liable, unless the right of recourse against such party is expressly reserved, or unless he is fully indemnified."

The New York Act omits the words, "unless made with the assent of the party secondarily liable."

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of any party by the holder operates as a discharge of only such other parties as, upon paying the instrument, would be entitled to sue the party to whom such discharge had been given. Bank of Kentucky v. Floyd, 4 Met. (61 Ky.) 159. In other words, if the holder does, or fails to do, that which destroys a prior party's right to recovery from one liable over to such prior party, the latter is discharged.

Under the Bankruptcy Act of 1898 (section 16*a*) a discharge in bankruptcy, though releasing the bankrupt from debts provable against him, is not a discharge as to the other parties on bills or notes accepted, made or endorsed by the bankrupt.

(*d*) The meaning of sub-sections 5 and 6 is doubtful in one particular. They seem to establish the rule that if the holder releases, or by a binding agreement gives time to, an accommodated drawer, the accommodating acceptor may still be liable, whether or not the holder knew that the acceptance was for accommodation. Where the holder does not know that the acceptance was for accommodation, it is clear that the acceptor remains liable, and also that the acceptor can recover against the drawer, although not on the instrument. Anderson v. Anderson, 4 Dana (34 Ky.) 352. If, however, the holder knows that the acceptance was for accommodation, he knows also that the drawer and not the acceptor is the "principal debtor," although upon the instrument he may appear to be the "person primarily liable," and in such case the release of or extension to the drawer has been held to discharge the acceptor. Schuff v. Germania Safety Vault & Trust Co., 19 K. L. R., 1457; 43 S. W., 229. In view, however, of section 29, it is not clear that this distinction can now be made.

(*e*) Note that the agreement must be one binding on the holder. Mere delay is not sufficient. Higgins v. Morrison, 4 Dana (34 Ky.) 107. Bank of Kentucky v. Floyd, 4 Met. (61 Ky.) 161.

The reservation rebuts the presumption that the drawer or indorser was meant to be discharged, and also prevents the rights of drawer or indorser against the acceptor or maker being impaired. The consent of the acceptor or maker that the holder may have recourse against the drawer or indorser implies a consent that the drawer or indorser, who pays the amount, may have recourse against the acceptor or maker. Daniel, Neg. Inst. (5th Ed.) section 1322.

The requirement that the reservation shall be always in writing is peculiar to the Kentucky Act and has changed the law as generally understood in that State; and the further provision, which is also peculiar to the Kentucky Act, that the reservation must be in the original instrument, will probably, because of the practical impossibility of the requirement in most cases, and its

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inconvenience in all, render the entire sub-section useless. No such requirements are made under sub-section 5, but the reason for the distinction between the sections in this particular is not apparent.

The maker of an accommodation note is not relieved from liability by an extension of the time of payment given without his consent, he being, under sections 29 and 191, the "person primarily liable" and absolutely required to pay.

Nat. Citizens' Bank v. Toplitz, 81 N. Y. S., 422; 81 App. Div., 593.

§ 121. **Right of Party Secondarily Liable Who Pays Instrument.**—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties (*a*), and he may strike out his own and all subsequent indorsements, and again negotiate the instrument (*b*), except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Eaton and Gilbert, Com. Paper, 552. *Norton, B. & N.*, 183, 295, 298.

(*a*) See section 119.

Twelfth Ward Bank v. Brooks, 71 N. Y. S., 388; 63 App. Div., 220;
Bradford v. Ross, 3 Bibb (6 Ky.) 239;
Miller v. Henshaw, 4 Dana (34 Ky.) 326;
Rice v. Hogan, 8 Dana (38 Ky.) 136;
Scott v. Doneghy, 17 B. M. (56 Ky.) 325;
Bowman v. Wright, 7 Bush (70 Ky.) 377.

The rights of accommodation indorsers, among themselves, are the same as those of ordinary indorsers. They are not co-sureties, and a prior indorser who pays the instrument can not recover from a later indorser. "The first indorser shall be considered as saying to the subsequent indorsers, 'I will stand behind you for the whole.'"

Hixon v. Reed, 2 Litt. (12 Ky.) 176;

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Crutcher v. Bank of Kentucky, 4 Litt. (14 Ky.) 436;
Smith v. Bacon, 3 J. J. M. (26 Ky.) 313.

But the rights and liabilities of indorsers among themselves may be changed by agreements among them (section 68).

Poignard v. Vernon, 1 Mon. (17 Ky.) 47;
Denton v. Lytle, 4 Bush (67 Ky.) 597;
Lewis v. Williams, 4 Bush (67 Ky.) 679.

Thus, where the drawer and the indorser executed a bill for the accommodation of the acceptor, with the agreement that each shall pay half if the acceptor failed to pay it, the one who is compelled to pay all can recover half from the other. Edelin v. White, 6 Bush (69 Ky.) 409; and when in such a case each did pay one-half to the holder, such an agreement between them will be presumed. Denton v. Lytle, 4 Bush (67 Ky.) 597.

The possession of the instrument by one secondarily liable thereon is evidence that it was taken up by him.

Tuggle v. Adams, 3 Mar. (10 Ky.) 432;
Miller v. Henshaw, 4 Dana (34 Ky.) 326.

Where a bill payable to the drawer's order is indorsed to his agent, the indorsement is virtually to the drawer, and no averment of his having paid it is necessary.

Rice v. Hogan, 8 Dana (38 Ky.) 136.

(*b*) See section 47. The indorsements must be stricken out in order that the subsequent negotiation may not make any of the parties liable who would otherwise be discharged.

§ 122. **Renunciation by Holder.**—The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon (*a*).

Eaton and Gilbert, Com. Paper, 542. *Norton, B. & N.,* 295, 302. *Randolph, Com. Paper,* § 1836.

(*a*) The requirement that the renunciation must be in writing has changed the law. See Daniel, Neg. Inst. (5th Ed.) section 1290.

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§ 123. **Cancellation; Unintentional; Burden of Proof.** —A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Eaton and Gilbert, Com. Paper, 541. *Norton, B. & N.,* 302.

§ 124. **Alteration of Instrument; Effect of—** Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Eaton and Gilbert, Com. Paper, 556. *Norton, B. & N.,* 246, 248, 295.

(*a*) As to authority to fill blanks, see section 14.

As to effect of forgery, see section 23.

As to what alterations are material, see section 125.

As to alterations by a stranger, this provision adopts the English law as declared in section 64 of the English Bills of Exchange Act, and has changed the law in Kentucky. Formerly the alteration of an instrument by a stranger did not avoid it.

Lee v. Alexander, 9 B. M. (48 Ky.) 26;
Lisle v. Rogers, 18 B. M. (57 Ky.) 539;
Terry v. Hazlewood, 1 Duv. (62 Ky.) 104;
Elbert v. McClelland, 8 Bush (71 Ky.) 579;
Blakey v. Johnson, 13 Bush (76 Ky.) 199.

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In *Jeffrey v. Rosenfeld*, 179 Mass., 506; 61 N. E., 49, the question is raised (*obiter*) whether the correct construction of this section is that an alteration by a stranger avoids the instrument as to all parties, except subsequent indorsers, whether they authorized or assented to it or not, or that a material alteration, whether made by a stranger or by a party avoids the instrument, except only as to those who authorized or assented to it and as to subsequent indorsers. The language of the section seems too clear to admit of doubt that the latter construction is the correct one.

Although a party may not have authorized or assented to the alteration, yet where he has himself, by careless execution of the instrument, left room for insertions amounting to material alterations to be made without exciting the suspicion of a careful man he will be liable to a holder in due course notwithstanding such alterations. This rule rests on the principle of estoppel, that the party so negligent has invited the public to receive the instrument and that he, and not an innocent holder, must bear the loss occasioned by his own negligence.

Woolfolk v. Bank of America, 10 Bush (73 Ky.) 514;
Blakey v. Johnson, 13 Bush (76 Ky.) 197;
Newell v. First Nat. Bank, 13 K. L. R., 775;
Cason v. Grant County Deposit Bank, 97 Ky., 487; 17 K. L. R., 344; 31 S. W., 40;
Hackett v. First Nat. Bank, 24 K. L. R., 1002; 70 S. W., 664;

But in such a case a reply merely denying an allegation that the instrument had been materially altered does not raise the issue of such negligence in the execution of it. Bank of Commerce v. Haldeman, 109 Ky., 222; 22 K. L. R., 717; 58 S. W., 587.

The intent with which a material alteration is made does not change the effect of it as to the instrument, but a material alteration fraudulently made not only avoids the instrument, but extinguishes the debt for which it was given. See Daniel, Neg. Inst. (5th Ed.) section 1410*a*. Jeffers v. Simpson, 11 K. L. R., 328.

Subsequent erasures of the matter constituting the alteration will not restore validity to the instrument.

Cotton v. Edwards, 2 Dana (32 Ky.) 106;
Lochrane v. Emmerson, 11 Bush (74 Ky.) 79.

The burden of explaining an alteration apparent on the instrument is on the party producing the paper, though the alteration be against his own interest; but where the alteration does not appear on the face of the instrument, the holder is not called on to explain nor introduce testimony until the fact of alteration has been shown by evidence outside the paper.

Elbert v. McClelland, 8 Bush (71 Ky.) 579;

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Cason v. Grant County Deposit Bank, 97 Ky., 487; 17 K. L. R., 344; 31 S. W., 40.

The question of whether an alteration is material or not is for the court; the question of whether or not any alteration has been made is a question of fact.

Blades v. Robbins, 9 K. L. R., 197;
Fowler v. Gordon, 3 K. L. R., 616.

(*b*) *Mutual Loan Ass'n. v. Lesser*, 78 N. Y. S., 629; 76 App. Div., 614.

Packard v. Windholz, 82 N. Y. S., 392; 40 Misc. Rep., 347; 84 N. Y. S., 666.

This provision also has changed the law in Kentucky. Formerly, a material alteration vitiating the instrument altogether, no action could be maintained by the holder on an altered instrument, even according to its original tenor.

Rucker v. Howard, 2 Bibb (5 Ky.) 167;
Stout v. Cloud, 5 Litt. (15 Ky.) 206;
Lisle v. Rogers, 18 B. M. (57 Ky.) 536;
Terry v. Hazlewood, 1 Duv. (62 Ky.) 109;
Duker v. Franz, 7 Bush (70 Ky.) 275.

§ 125. **What Constitutes a Material Alteration.**—Any alteration which changes:

1. The date (*a*).
2. The sum payable, either for principal (*b*) or interest (*c*).
3. The time (*d*) or place (*e*) of payment.
4. The number of the relations of the parties (*f*).
5. The medium or currency in which payment is to be made. Or which adds a place of payment where no place of payment is specified (*g*), or any other change or addition which alters the effect of the instrument in any respect, is a material alteration (*h*).

Eaton and Gilbert, Com. Paper, 561. *Norton, B. & N.,* 249, 295.

(*a*) Stout v. Cloud, 5 Litt. (15 Ky.) 296;
Lee v. Alexander, 9 B. M. (48 Ky.) 26;
Lisle v. Rogers, 18 B. M. (57 Ky.) 535;

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Duker v. Franz, 7 Bush (70 Ky.) 275.

(*b*) Newell v. First Nat. Bank, 13 K. L. R., 775;
Hackett v. First Nat. Bank, 24 K. L. R., 1002; 70 S. W., 664.

(*c*) Lochnane v. Emmerson, 11 Bush (74 Ky.) 69;
First Nat. Bank v. Dawson, 2 K. L. R., 230;
Gaines v. Scott, 3 K. L. R., 418;

(*d*) Blakey v. Johnson, 13 Bush (76 Ky.) 197;
First Nat. Bank v. Payne, 19 K. L. R., 839; 42 S. W., 736.

(*e*) Marion Nat. Bank v. Russell, 14 K. L. R., 368;
Cason v. Grant County Deposit Bank, 97 Ky., 487; 17 K. L. R., 344; 31 S. W., 40.

(*f*) The word "of" in this sentence should be read "or."
Bank of Limestone v. Penick, 5 Mon. (21 Ky.) 32;
Pulliam v. Withers, 8 Dana (38 Ky.) 99;
Shipp v. Suggett, 9 B. M. (48 Ky.) 8;
Singleton v. McQueery, 85 Ky., 41; 8 K. L. R., 710; 2 S. W., 652;
Rumley Co. v. Wilcher, 23 K. L. R., 1745; 66 S. W., 7;

A note drawn by A. to his own order and delivered by him without indorsement to B. to be used to take up a note in bank made by B. and endorsed by A. was by the bank altered without A.'s knowledge, by striking out his name as payee and inserting that of B. *Held*, that the alteration was material and avoided the note as to A. *Hoffman v. Planters' Nat. Bank*, 99 Va., 480; 39 S. E., 134.

(*g*) Whitesides v. Northern Bank of Kentucky, 10 Bush (73 Ky.) 503.

(*h*) Warren v. Fant, 79 Ky., 1.

An alteration which does not change the legal effect of the instrument is immaterial and does not vitiate it.

Phillips v. Breck, 79 Ky., 465; 3 K. L. R., 271;
Tranter v. Hibbard, 108 Ky., 265; 21 K. L. R., 1710; 56 S. W., 69.

In Rogers v. Poston, 1 Met. (58 Ky.) 645 and in Todd v. Bank of Kentucky, 3 Bush (66 Ky.) 626, it was held that where one indorses a bill for the accommodation of the drawee, it bearing at the time the drawee's name written across its face, and leaves it with the drawee to be used by him to raise money, the drawee might thereafter write out an acceptance above his signature and designate a place of payment, and that the bill was not thereby materially altered. This section has probably changed the rule laid down by these cases.

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TITLE II.—BILLS OF EXCHANGE.

ARTICLE 1.

FORM AND INTERPRETATION.

Section 126. Bill of exchange defined.
127. Bill not an assignment of funds in hands of drawee.
128. Bill addressed to more than one drawee.
129. Inland and foreign bills of exchange.
130. When bill may be treated as promissory note.
131. Drawee in case of need.

§ 126. **Bill of Exchange Defined.**—A bill of exchange is an unconditional order (*a*) in writing (*b*) addressed by one person to another, signed by the person giving it (*c*), requiring the person to whom it is addressed to pay on demand (*d*), or at a fixed or determinable future time (*e*), a sum certain (*f*) in money (*g*) to order (*h*) or to bearer (*i*).

Eaton and Gilbert, Com. Paper, 577. *Norton, B. & N.,* 22.

See Gaar v. Louisville Banking Co., 11 Bush (74 Ky.) 180.

A general request in writing to pay money to the drawer's own order is a bill of exchange which the drawer may make payable to himself by indorsement.

Rice v. Hogan, 8 Dana (38 Ky.) 134.

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3429-3434; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 126-131; Maryland, 145-150; New York, 210-215; Ohio, 3175*p*-3175*v*; Rhode Island, 134-139; Wisconsin, 1680-1680*e*.

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(*a*) As to what orders are unconditional, see section 3.

(*b*) "Writing" includes print, section 190.

(*c*) As to what is a sufficient signature, see section 1, note (*c*). An unsigned order reading, "Six months after date, pay to the order of J. T.," &c., addressed to R. and accepted by him on its face, and indorsed by J. T. on its back, is not a bill of exchange.

Tevis v. Young, 1 Met. (58 Ky.) 197.

(*d*) As to what instruments are payable on demand, see section 7.

(*e*) As to what constitutes a determinable future time, see section 4. An instrument reading, "August 14th, 1901, Mr. Wm. Tebo will please pay R. J. Torpey or order $250.00. Due Oct. 1st," and signed by the drawer, is due October 1st, 1901.

Torpey v. Tebo, 68 N. E. (Mass.) 223.

The words in a bill, "one hundred and eighty days, pay to the order of," mean that it is due one hundred and eighty days after the date.

Moreland v. Citizens' Savings Bank, 24 K. L. R., 1354; 71 S. W., 520.

(*f*) As to certainty of sum payable, see section 2.

(*g*) As to the meaning of "money," see section 1, note (*f*).

(*h*) A writing in the form of a bill, but not payable to order or to bearer, is not a bill of exchange.

Westberg v. Chicago Lumber & Coal Co., 117 Wis., 589; 94 N. W., 572.

As to when instruments are payable to order, see section 8.

(*i*) As to when instrument is payable to bearer, see section 9.

§ 127. **Bill Not an Assignment of Funds in Hands of Drawee.**—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts (*a*) the same.

Eaton and Gilbert, Com. Paper, 578.

(*a*) The acceptance of a bill amounts to an appropriation of funds of the drawer in the acceptor's hands to its payment, and the acceptor can not pay the funds or any part of them to the drawer or to a volunteer under the drawer, such as an assignee for the benefit of the drawer's creditors.

Buckner v. Sayre, 18 B. M. (57 Ky.) 746.

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§ 128. **Bill Addressed to More Than One Drawee.**—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.*

Eaton and Gilbert, Com. Paper, 580.

§ 129. **Inland and Foreign Bills of Exchange.**—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State (*a*). Any other bill is a foreign bill (*b*). Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill (*c*).

Eaton and Gilbert, Com. Paper, 581. *Norton, B. & N.,* 24. *Randolph, Com. Paper,* § 236.

(*a*) Taylor v. Bank of Illinois, 7 Mon. (23 Ky.) 579; Young v. Bennett, 7 Bush (70 Ky.) 477.

(*b*) Chenowith v. Chamberlin, 6 B. M. (45 Ky.) 61; Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky., 694; 22 K. L. R., 1333; 60 S. W., 537.

(*c*) In Harmon v. Wilson, 1 Duv. (62 Ky.) 323, a bill not showing on its face the place where it was drawn, but addressed to the drawee at Cincinnati, Ohio, was held to be a foreign bill, because of the fact that the drawer was a resident of Kentucky. This section has changed the law in this particular.

Courts will not take judicial notice of the fact that a city, village, or town, mentioned in a bill as the place where it was drawn or made payable, is located in a foreign State.

Eaton and Gilbert, Com. Paper, 14. Daniel, Neg. Inst., section 11.

§ 130. **When Bill May be Treated as Promissory Note.**—Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may

*The Wisconsin Act omits the words, "or in succession."

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treat the instrument at his option, either as a bill of exchange or a promissory note (*a*).

Eaton and Gilbert, Com. Paper, 581.

(*a*) Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election. Section 17.

In Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky., 694; 22 K. L. R., 1333; 60 S. W., 537, it was held that a bill drawn by an agent on his principal, by authority of the principal, was in legal effect only the note of the principal. Under this section, however, the holder may treat such an instrument as a bill of exchange.

§ 131. **Referee in Case of Need.**—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need; that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

Eaton and Gilbert, Com. Paper, 581.

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ARTICLE II.

ACCEPTANCE OF BILLS OF EXCHANGE.

Section 132. Acceptance, how made, *et cetera.*
133. Holder entitled to acceptance on face of bill.
134. Acceptance by separate instrument.
135. Promise to accept; when equivalent to acceptance.
136. Time allowed drawee to accept.
137. Liability of drawee refusing to return bill or destroying it.
138. Acceptance of incomplete bill.
139. Kinds of acceptances.
140. Acceptance to pay at a particular place.
141. Qualified acceptance.
142. Rights of parties as to qualified acceptance.

§ 132. **Acceptance; How Made, Et Cetera.**—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee (*a*). It must not express that the drawee will perform his promise by any other means than the payment of money.

Eaton and Gilbert, Com. Paper, 593. *Norton, B. & N.,* 78, 83, 86, 91.

(*a*) *Izzo v. Ludington,* 79 N. Y. S., 744; 79 App. Div., 272.
The requirement that the acceptance shall be in writing has

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changed the law in Kentucky. See Daniel, Neg. Inst. (5th Ed.) sections 504-507*a*.

It is not necessary, however, that the acceptance shall be written on the bill. It may be made by letter or by telegraph.

North Atchison Bank v. Garretson, 51 F., 167.

In Rogers v. Poston, 1 Met. (58 Ky.) 646 and in Todd v. Bank of Kentucky, 3 Bush (66 Ky.) 626, it was held, contrary to the almost unanimous decisions elsewhere, that the drawee's writing his name across the face of the bill was not an acceptance, or at least not a complete acceptance, and that when, at the request of the drawee, an indorser had put his name on a bill, across the face of which the drawee had written his name, and then delivered the bill to the drawee to enable him to raise money on it, the indorser remained bound, although the drawee, without the consent of the indorser, afterwards wrote over his own signature an acceptance payable at a particular place.

A necessary implication from sections 63 and 64, however, is that a party to a bill who puts his name on it intends to bind himself in the capacity in which he appears to be a party, and not otherwise, and, as by section 125, the addition of a place of payment where none is specified, is a material alteration, it seems that the statute has changed the rule established by these cases. See also section 138.

§ 133. **Holder Entitled to Acceptance on Face of Bill.**—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.

Eaton and Gilbert, Com. Paper, 596. *Randolph, Com. Paper,* § 606.

§ 134. **Acceptance by Separate Instrument.**—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Eaton and Gilbert, Com. Paper, 596. *Norton, B. & N.,* 97. *Randolph, Com. Paper,* § 606.

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§ 135. **Promise to Accept; When Equivalent to Acceptance.**—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance (*a*) in favor of every person who, upon the faith thereof, receives the bill for value (*b*).

Eaton and Gilbert, Com. Paper, 597. *Norton, B. & N.,* 97. *Randolph, Com. Paper,* § 614.

(*a*) Where the drawee of a bill, by his writing authorizing it to be drawn, induces its taking by the payee, he has in effect accepted the bill, and a promise made to him by the payee, in order to secure the drawee's acceptance on the face of the bill, that if the drawer did not take it up he, the payee, would, is without consideration and no defense to an action on the acceptance.

Vance v. Ward, 2 Dana (32 Ky.) 95.

The requirement that the promise shall be in writing is wholly statutory, and has changed the law in Kentucky.

(*b*) In Read v. Marsh, 5 B. M. (44 Ky.) 10, it was held that one who had promised to accept an existing bill was liable as an acceptor to the holder, although the latter had received the bill without notice of the promise. The statute has changed the law in this particular.

§ 136. **Time Allowed Drawee to Accept.**—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

Eaton and Gilbert, Com. Paper, 601. *Norton, B. & N.,* 95, 103. *Randolph, Com. Paper,* § 620.

§ 137. **Liability of Drawee Refusing to Return Bill or Destroying it.**—Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return

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the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same (*a*).

Eaton and Gilbert, Com. Paper, 602. *Norton, B. & N.,* 95, 103. *Randolph, Com. Paper,* § 620.

(*a*) Under a similar statute of New York, before the passage of the Negotiable Instruments Law of that State, it was held that the refusal referred to in the statute was an affirmative act, or such conduct as amounted to an affirmative act; and that mere retention of the bill was not an acceptance. Matteson v. Moulton, 79 N. Y., 627. This seems to be the correct construction of this section, which relates to a *refusal* to return, not to a mere neglect to return.

The provision that the destruction of the bill by the drawee is to be deemed an acceptance of it, is an innovation. Such a destruction of the bill postpones the holder's rignt to sue the drawer until the bill is dishonored by non-payment.

§ 138. **Acceptance of Incomplete Bill.**—A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Eaton and Gilbert, Com. Paper, 603. *Norton, B. & N.,* 88, 104.

§ 139. **Kinds of Acceptances.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn (*a*).

Eaton and Gilbert, Com. Paper, 605. *Norton, B. & N.,* 84.

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(*a*) A qualification of the acceptance will in some cases be a material alteration. See section 125.

§ 140. **Acceptance to Pay at a Particular Place.**—An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere (*a*).

Eaton and Gilbert, Com. Paper, 605. *Norton, B. & N.,* 84. *Randolph, Com. Paper,* §§ 626, 1130.

(*a*) See section 70 as to presentment for payment in such cases.

§ 141. **Qualified Acceptance.**—An acceptance is qualified which is:

1. Conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
2. Partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
3. Local; that is to say, an acceptance to pay only at a particular place (*a*).
4. Qualified as to time (*b*).
5. The acceptance of some one or more of the drawees, but not of all.

Eaton and Gilbert, Com. Paper, 605. *Norton, B. & N.,* 84, 85.

(*a*) Rogers v. Poston, 1 Met. (53 Ky.) 647;
Todd v. Bank of Kentucky, 3 Bush (66 Ky.) 632.

(*b*) "I will see the within paid eventually," written on the back of an order by the drawee, is a binding acceptance to pay forthwith.

Brannin v. Henderson, 12 B. M. (51 Ky.) 62.

§ 142. **Rights of Parties as to Qualified Acceptance.**—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified ac-

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ceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notices of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

Eaton and Gilbert, Com. Paper, 608. *Norton, B. & N.,* 85. *Randolph, Com. Paper,* § 621.

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ARTICLE III.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

Section 143. When presentment for acceptance must be made.
144. When failure to present releases drawer and indorser.
145. Presentment; how made.
146. On what days presentment may be made.
147. Presentment; where time is insufficient.
148. When presentment is excused.
149. When dishonored by non-acceptance.
150. Duty of holder where bill not accepted.
151. Rights of holder where bill not accepted.

§ 143. **When Presentment for Acceptance Must be Made.**—Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable (*a*).

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3446-3454; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 143-151; Maryland, 162-170; New York, 240-248; Ohio, 3176*g*-3176*o*; Rhode Island, 151-159; Wisconsin, 1681-1681-8.

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Eaton and Gilbert, Com. Paper, 585. *Norton, B. & N.,* 341, 345.

(*a*) Although a bill payable at a fixed time need not be presented for acceptance, yet if it be presented before that time and acceptance refused, notice of dishonor by non-acceptance must be given to the drawer and indorsers. See section 102, note (*a*).

§ 144. **When Failure to Present Releases Drawer and Indorser.**—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged.

Eaton and Gilbert, Com. Paper, 587. *Norton, B. & N.,* 344. *Randolph, Com. Paper,* § 574.

§ 145. **Presentment; How Made.**—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is overdue, to the drawer or some person authorized to accept or refuse acceptance on his behalf (*a*); and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.
2. Where the drawee is dead, presentment may be made to his personal representative (*b*).
3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

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Eaton and Gilbert, Com. Paper, 588. *Norton, B. & N.,* 351, 361, 363. *Randolph, Com. Paper,* §§ 572, 573.

(*a*) An acceptance must be in writing and signed by the drawee (section 132); and in Kentucky the authority of an agent to sign the name of his principal as an acceptor must be in writing (section 19).

(*b*) Presentment is not necessary in such cases (section 148); but it is advisable in order that the bill may be protested, the notary's certificate of protest affording the most convenient evidence of dishonor.

§ 146. **On What Days Presentment May be Made.** —A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act.*

Eaton and Gilbert, Com. Paper, 590.

§ 147. **Presentment; Where Time is Insufficient.** —Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

Eaton and Gilbert, Com. Paper, 590.

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*The Act in other States except Wisconsin and Colorado adds: "When Saturday is not otherwise a holiday, presentment for acceptance may be made before 12 o'clock noon on that day."

The Colorado Act adds the following: "When any day is part of a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday."

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§ 148. **Where Presentment is Excused.**—Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead or has absconded or is a fictitious person or a person not having capacity to contract by bill.
2. Where, after the exercise of reasonable diligence, presentment can not be made.
3. Where, although presentment has been irregular, acceptance has been refused on some (*a*) ground.

Eaton and Gilbert, Com. Paper, 591. *Norton, B. & N.,* 363, 398. *Randolph, Com. Paper,* § 570.

(*a*) In the act as adopted elsewhere the word "other" appears before "ground." The context requires its insertion in the Kentucky act.

§ 149. **When Dishonored by Non-acceptance.**—A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or can not be obtained; or
2. When a presentment for acceptance is excused and the bill is not accepted.

Eaton and Gilbert, Com. Paper, 591.

§ 150. **Duty of Holder Where Bill Not Accepted.**—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Eaton and Gilbert, Com. Paper, 592.

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§ 151. **Rights of Holder Where Bill Not Accepted.** —When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

Eaton and Gilbert, Com. Paper, 592. *Norton, B. & N.,* 342.

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ARTICLE IV.

PROTEST OF BILLS OF EXCHANGE.

Section 152. In what cases protest necessary; effect of failure to protest when protest necessary.
153. Protest; how made.
154. Protest; by whom made.
155. Protest; at what time to be made; noting.
156. Protest; where made.
157. Protest both for non-acceptance and non-payment.
158. Protest before maturity where acceptor bankrupt or insolvent.
159. When protest dispensed with.
160. Protest; where bill is lost, *et cetera*.

§ 152. **In What Cases Protest Necessary; Effect of Failure to Protest When Protest Necessary.**—Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged (*a*). Where a bill does not appear on its face to be a foreign bill protest thereof, in case of dishonor, is unnecessary (*b*).

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3455-3463; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 152-160; Maryland, 171-179; New York, 260-268; Ohio, 3176*p*-3176*x*; Rhode Island, 160-168; Wisconsin, 1681-9-1681-17.

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Eaton and Gilbert, Com. Paper, 609. *Norton, B. & N.,* 370, 371. *Randolph, Com. Paper,* § 1142.

(*a*) Read v. Bank of Kentucky, 1 Mon. (17 Ky.) 91;
Chenowith v. Chamberlin, 6 B. M. (45 Ky.) 61;
Hays v. Citizens' Savings Bank, 101 Ky., 201; 19 K. L. R., 367; 40 S. W., 573.

As to the former of law of Kentucky concerning what instrument could be protested, see section 118, note (*a*).

(*b*) As to what bills are foreign, see section 129. In Piner v. Clary, 17 B. M. (56 Ky.) 663, it was held that a certificate of deposit issued in Ohio, and under the Ohio law a negotiable instrument, became, upon indorsement made in Kentucky, in effect a foreign bill, the indorser being treated as the drawer, so that a failure to protest the paper on dishonor released him. But however much the right of the indorser of such an instrument, or of any other note, may resemble that of the drawer of a bill, the instrument under the present statute is a note and not a bill, and protest is not now necessary.

§ 153. **Protest; How Made.**—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal (*a*) of the notary making it, and must specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found (*b*).

Eaton and Gilbert, Com. Paper, 611. *Norton, B. & N.,* 369, 371.

(*a*) The requirement of the notary's seal has changed the law of Kentucky with respect to certificates of notaries appointed in Kentucky. Formerly the signature alone was sufficient.
Bank of Kentucky v. Pursely, 3 Mon. (18 Ky.) 240;
Lail v. Kelly, 3 B. M. (42 Ky.) 11;
Huffaker v. Nat. Bank of Monticello, 12 Bush (75 Ky.) 293.

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(*b*) Section 3721, Ky. Stats. (sub-section 5) requires every certificate of a notary to state the date of the expiration of his commission; but a failure to do so does not vitiate the certificate.

Harbour Pitt Shoe Co. v. Dixon, 22 K. L. R., 1169; 60 S. W., 186.

The certificate of the notary is *prima facie* evidence of demand and dishonor, Kentucky Stats., section 479.

Tyler v. Bank of Kentucky, 7 Mon. (23 Ky.) 557;

Trabue v. Sayre, 1 Bush (64 Ky.) 129.

Where the owner of a bill fills up a blank indorsement by directing payment to be made to another, and delivers it to such other person for collection only, and the bill is thereafter indorsed specially by the agent for collection to another also for the purpose of collection only, and it is returned by the last indorsee protested for non-acceptance, the owner may strike out the indorsements subsequent to his own and convert the first indorsement into an indorsement to himself and use the certificate of protest as evidence of non-acceptance if, after such changes, the bill still appears to be that mentioned in the certificate.

Bank of Tennessee v. Smith, 9 B. M. (48 Ky.) 609.

Sections 3723 and 3724 of the Kentucky Statutes, which are reenactments of an Act of January 16, 1864, and of sections 3 and 5, Ch. 79 of the General Statutes, read as follows: "§ 3723. It shall be the duty of the notaries public of this Commonwealth to record in a well-bound and properly-indexed book, kept for that purpose, all protests by them made for the non-acceptance or non-payment of all bills of exchange, checks or promissory notes, placed on the footings of the bills of exchange, and on which a protest is now required by law, or of the dishonor of which such protest is now evidence by law, and a copy of such protest, certified by the said notary public under his notarial seal shall be *prima facie* evidence in all the courts of this Commonwealth.

"§ 3724. Upon the resignation of such notary public or the expiration of his term of office, and he is not re-appointed, it shall be his duty to place such book in the office of the clerk of the county court in and for the county in which said notary was appointed; and when the notary shall die, his representative shall deposit the said book with the clerk aforesaid, and thereafter a copy of such record, certified by the clerk, shall be evidence in all the courts of this Commonwealth."

These sections have not been repealed by the Negotiable Instruments Law, but as promissory notes are no longer on the footing of foreign bills of exchange, the sections quoted are now applicable only to protests of such bills. See note (*a*) to section 91.

Section 3726 of the Kentucky Statutes is as follows: "When any bill of exchange or commercial paper has heretofore or shall here-

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after be protested in any other State of these United States, in which the same is made payable, and by the laws of said State a notary public or other officer legally authorized to protest the same is required to give or send notice of the dishonor thereof to the parties, or when his certificate or a copy thereof that such notice or notices were sent is evidence thereof in the courts of such State, the same shall be received as evidence in all the courts of this Commonwealth, in all actions of such bills of exchange and have the same effect as evidence as is given to such evidence in the courts of such State."

§ 154. **Protest; by Whom Made.**—Protest may be made by:

1. A notary public (*a*); or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more creditable witnesses (*b*).

Eaton and Gilbert, Com. Paper, 615. *Norton, B. & N.,* 371. *Randolph, Com. Paper,* § 1152.

(*a*) The presentment and demand should be made by the notary himself and not by his clerk; but where by law or custom presentment and demand by a clerk or deputy of the notary is sanctioned, a protest signed by the notary which certifies that the presentment and demand were made by his deputy is *prima facie* evidence that the presentment, demand and protest have been made according to such law or usage.

McClane v. Fitch, 4 B. M. (43 Ky.) 600;
Bank of Kentucky v. Gary, 6 B. M. (45 Ky.) 630.

A notary is not disqualified from making the protest by the fact that he is the cashier of, and a stockholder in the bank on behalf of which he makes the protest.

Moreland v. Citizens' Savings Bank, 97 Ky., 211; 17 K. L. R., 88; 30 S. W., 637.

(*b*) Read v. Bank of Kentucky, 1 Mon. (17 Ky.) 92; Bank of Kentucky v. Pursley, 3 Mon. (19 Ky.) 239. In such case, the person protesting should draw and certify the certificate.

§ 155. **Protest; at What Time to be Made; Noting.**—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is ex-

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cused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting (*a*).

Eaton and Gilbert, Com. Paper, 616. *Norton, B. & N.,* 369, 371. *Randolph, Com. Paper,* § 1140.

(*a*) The short note of a notary usually made upon a bill when it is presented for non-acceptance, which is drawn payable after date, when acceptance has been refused, is competent evidence for a defendant to prove that the bill had been presented and dishonored, in order to avoid responsibility for want of notice in due time of such dishonor.

Smith v. Roach, 7 B. M., (46 Ky.) 19.

§ 156. **Protest; Where Made.**—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary.

Eaton and Gilbert, Com. Paper, 617. *Norton, B. & N.,* 370, 371.

§ 157. **Protest Both for Non-acceptance and Non-payment.**—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Eaton and Gilbert, Com. Paper, 618. *Norton, B. & N.,* 371.

§ 158. **Protest Before Maturity Where Acceptor Bankrupt or Insolvent.**—Where the acceptor has been adjudged a bankrupt or an insolvent or has made

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an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Eaton and Gilbert, Com. Paper, 618. *Norton, B. & N.,* 371.

§ 159. **When Protest Dispensed With.**—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Eaton and Gilbert, Com. Paper, 619. *Norton, B. & N.,* 371.

§ 160. **Protest Where Bill is Lost, Et Cetera.**—Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Eaton and Gilbert, Com. Paper, 619. *Norton, B. & N.,* 371.

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ARTICLE V.

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

Section 161. When bill may be accepted for honor.
162. Acceptance for honor; how made.
163. When deemed to be an acceptance for honor of the drawer.
164. To whom acceptor for honor liable.
165. Agreement of acceptor for honor.
166. Maturity of bill payable after sight accepted for honor.
167. Protest of bill accepted for honor, *et cetera.*
168. Presentment for payment to acceptor for honor; how made.
169. When delay in making presentment is excused.
170. Dishonor of bill by acceptor for honor; protest necessary.

§ 161. **When Bill May be Accepted for Honor.**—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The accept-

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3464-3473; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 161-170; Maryland, 180-189; New York, 280-289; Ohio, 3176*y*-3177*g*; Rhode Island, 169-178; Wisconsin, 1681-18-1681-27.

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ance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Eaton and Gilbert, Com. Paper, 620. *Norton, B. & N.,* 102, 152, 480. *Randolph, Com. Paper,* §1188.

(*a*) Gazzam v. Armstrong, 3 Dana (33 Ky.) 556.

There can be no acceptance or payment for honor, except after the bill has been protested. *Id.*

§ 162. **Acceptance for Honor; How Made.**—An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor (*a*).

Eaton and Gilbert, Com. Paper, 621. *Norton, B. & N.,* 102, 152, 480.

(*a*) Formerly it was necessary that the acceptance for honor should be accompanied by a declaration before a notary and witnesses (Gazzam v. Armstrong, 3 Dana (33 Ky.) 556), and that it should be written on the bill (Daniel, Neg. Inst. (5th Ed.) section 523). The statute (see also section 134) has changed the law in both particulars.

The acceptor for honor should at once notify the fact to the party for whose honor he accepts.

§ 163. **When Deemed to be an Acceptance for Honor of the Drawer.**—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Eaton and Gilbert, Com. Paper, 622. *Norton, B. & N.,* 102, 152, 480.

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§ 164. **To Whom Acceptor for Honor Liable.**—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted (*a*).

Eaton and Gilbert, Com. Paper, 622. *Norton, B. & N.,* 102, 152, 480.

(*a*) Gazzam v. Armstrong, 3 Dana (33 Ky.) 556.

§ 165. **Agreement of Acceptor for Honor.**—The acceptor for honor by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

Eaton and Gilbert, Com. Paper, 622. *Norton, B. & N.,* 102, 152, 480.

§ 166. **Maturity of Bill Payable After Sight Accepted for Honor.**—When a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honor (*a*).

Eaton and Gilbert, Com. Paper, 623. *Norton, B. & N.,* 102, 152, 480.

(*a*) Apart from statute, the time runs from the date of the acceptance for honor. Daniel, Neg. Inst. (5th Ed.) section 531.

§ 167. **Protest of Bill Accepted for Honor, Et Cetera.**—Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is

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presented for payment to the acceptor for honor or referee in case of need.

Eaton and Gilbert, Com. Paper, 623. *Norton, B. & N.,* 102, 152, 371, 480.

§ 168. **Presentment for Payment to Acceptor for Honor; How Made.**—Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 104.

Eaton and Gilbert, Com. Paper, 624.

§ 169. **When Delay in Making Presentment is Excused.**—The provisions of section 81 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Eaton and Gilbert, Com. Paper, 623.

§ 170. **Dishonor of Bill by Acceptor for Honor; Protest Necessary.**—When the bill is dishonored by the acceptor for honor, it must be protested for non-payment by him.

Eaton and Gilbert, Com. Paper, 624. *Norton, B. & N.,* 102, 152, 480.

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ARTICLE VI.

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

Section 171. Who may make payment for honor.
172. Payment for honor; how made.
173. Declaration before payment for honor.
174. Preference of parties offering to pay for honor.
175. Effect on subsequent parties where bill is paid for honor.
176. Where holder refuses to receive payment *supra* protest.
177. Right of paper for honor to receive bill and protest.

§ 171. **Who May Make Payment for Honor.**—Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Eaton and Gilbert, Com. Paper, 625. *Norton, B. & N.,* 301.

§ 172. **Payment for Honor How Made.**—The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment, must be at-

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Note.—The numbers of the sections of this article in other States than Kentucky, (except in Idaho and Montana) are as follows: Arizona, 3474-3480; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 171-177; Maryland, 190-196; New York, 300-306; Ohio, 3177*h*-3177*n;* Rhode Island, 179-185; Wisconsin, 1681-28-1681-34.

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tested by a notarial act of honor which may be appended to the protest or form an extension to it.

Eaton and Gilbert, Com. Paper, 625. *Norton, B. & N.,* 301.

§ 173. **Declaration Before Payment for Honor.**—The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

Eaton and Gilbert, Com. Paper, 626. *Norton, B. & N.,* 301.

§ 174. **Preference of Parties Offering to Pay for Honor.**—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Eaton and Gilbert, Com. Paper, 626. *Norton, B. & N.,* 301.

§ 175. **Effect on Subsequent Parties Where Bill is Paid for Honor.**—Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter (*a*).

Eaton and Gilbert, Com. Paper, 626. *Norton, B. & N.,* 301.

(*a*) For example, where the payment is for the honor of the

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drawer, the person paying for his honor can not have recourse against an acceptor for the accommodation of the maker.

Gazzam v. Armstrong, 3 Dana (33 Ky.) 556.

There can be no payment for honor, except of bills of exchange, *Id.*, 557.

§ 176. **Where Holder Refuses to Receive Payment Supra Protest.**—Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.

Eaton and Gilbert, Com. Paper, 626. *Norton, B. & N.,* 301.

§ 177. **Rights of Payer for Honor.**—The payer for honor on paying to the holder the amount of the bill and the notarial expenses incident to its dishonor, is entitled to receive both the bill itself and the protest.

Eaton and Gilbert, Com. Paper, 627. *Norton, B. & N.,* 301.

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ARTICLE VII.

BILLS IN A SET.

Section 178. Bills in a set constitute one bill.
179. Rights of holders where different parts are negotiated.
180. Liability of holder who indorses two or more parts of a set to different persons.
181. Acceptance of bills drawn in sets.
182. Payment by acceptor of bills drawn in sets.
183. Effect of discharging one of a set.

§ 178. **Bills in Sets Constitute One Bill.**—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill (*a*).

Eaton and Gilbert, Com. Paper, 582. *Norton, B. & N.,* 25.

(*a*) In an action by an indorsee against the acceptor, the title of the plaintiff is made out *prima facie* by the production of the part which has been accepted.
Johnson v. Offutt, 4 Met. (61 Ky.) 22.

§ 179. **Rights of Holders Where Different Parts are Negotiated.**—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3481-3486; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 178-183; Maryland, 197-202 New York, 310-315; Ohio, 3177*o*-3177*t;* Rhode Island, 186-191; Wisconsin, 1681-35-1681-40.

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true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Eaton and Gilbert, Com. Paper, 583. *Norton, B. & N.,* 25.

§ 180. **Liability of Holder Who Indorses Two or More Parts of a Set to Different Persons.**—Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

Eaton and Gilbert, Com. Paper, 583. *Norton, B. & N.,* 25.

§ 181. **Acceptance of Bills Drawn in Sets.**—The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part of it as if it were a separate bill.

Eaton and Gilbert, Com. Paper, 583. *Norton, B. & N.,* 25.

§ 182. **Payment by Acceptor of Bills Drawn in Sets.**—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Eaton and Gilbert, Com. Paper, 584. *Norton, B. & N.,* 25, 297.

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§ 183. **Effect of Discharging One of a Set.**—Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.*

Eaton and Gilbert, Com. Paper, 584. *Norton, B. & N.,* 25, 297.

*The Wisconsin Act contains an additional article (sections 1682-1683) providing for payment of exchange and damages.

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TITLE III.—PROMISSORY NOTES AND CHECKS.

ARTICLE I.

Section 184. Promissory note defined.
185. Check defined.
186. Within what time a check must be presented.
187. Certification of check; effect of.
188. Effect where the holder of check procures it to be certified.
189. Check does not operate as an assignment of fund.

§ 184. **Promissory Note Defined.**—A negotiable promissory note within the meaning of this act is an unconditional promise (*a*) in writing (*b*) made by one person to another, signed (*c*) by the maker engaging to pay on demand (*d*) or at a fixed or determinable future time (*e*), a sum certain (*f*) in money (*g*) to order (*h*) or to bearer (*i*). Where a note is drawn to the maker's own order, it is not complete until indorsed by him (*j*).

Eaton and Gilbert, Com. Paper, 17 and 73 N. Y. S., 967. *Norton, B. & N.,* 25, 275. *Randolph, Com. Paper,* § 651.

(*a*) The words, "I have borrowed" so much money, are equivalent to a promise to repay. Harrow v. Dugan, 6 Dana (36 Ky.)

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Arizona, 3487-3491; Colorado, Connecticut, District of Columbia, Florida, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington, 184-189; Maryland, 203-208; New York, 320-325; Ohio, 3177*u*-3177*z*; Rhode Island, 192-197; Wisconsin, 1684-1684-5.

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341; so are the words, "Whereas, J. L. has loaned me $100.00, which is to draw interest from date until paid, which is to be due and payable November 1, 1887." Kendall v. Lewis, 10 K. L. R., 362.

As to when the promise is unconditional, see section 3.

(*b*) Writing includes print, etc. See section 190.

(*c*) As to what is a sufficient signature, see section 1, note (*c*).

(*d*) As to what instruments are payable on demand, see section 7.

(*e*) As to what constitutes a determinable future time, see section 4.

(*f*) As to certainty of sum payable, see section 2.

(*g*) As to meaning of "money" see section 1, note (*f*).

(*h*) As to when instruments are payable to order, see section 8.

(*i*) As to what instruments are payable to bearer, see section 9.

(*j*) Kentucky Statutes, section 480. See Bramblett v. Caldwell, 105 Ky., 202; 20 K. L. R., 1123; 48 S. W., 982.

This section has made important changes in the law of Kentucky. Formerly promissory notes were not negotiable instruments unless made payable at a bank incorporated under the laws of the State, or organized in the State under the laws of the United States, and discounted by a bank of the kind specified. Notes so made payable and so discounted were placed upon the footing of *foreign* bills of exchange. Ky. Stats., section 483.

Under the present law, the negotiability of a note does not depend on, nor is it affected by, the fact that it is, or is not, payable at a bank; and the discount of a note by a bank creates no other right or liability than those created by its transfer to an individual. The effects of now making a note payable at a bank are: First—That, as in other cases of notes payable at a particular place, presentment at such place is necessary in order to charge the parties secondarily liable, and that if the person primarily liable is at the place designated for payment, at maturity, and is willing and able to pay it there, such ability and willingness are equivalent to a tender of payment on his part (section 70). Second—That the note is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon (section 87).

By the Kentucky Statute of limitation (sections 2511, 2512, Ky. Stats., in effect October 2, 1893) the period of limitation for an action "upon a bill of exchange, check, draft, or order, or any indorsement thereof, or upon a promissory note, placed upon the footing of a bill of exchange" is five years and for an action on any other "bond or obligation for the payment of money," fifteen years from the time the cause of action accrued. The provisions of the Negotiable Instruments Law are complete as to the negotiability of promissory notes and supersede tne former law on that subject; and promissory notes can not longer be "on the foot-

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ing of foreign bills of exchange." A literal construction of the statute of limitation would, therefore, make the period of limitation for promissory notes fifteen years. On the other hand, the fact that at the time of the passage of the statute of limitation foreign bills of exchange and promissory notes placed on the footing of foreign bills of exchange were the only instruments which, under the law, were negotiable, and the fact also that for more than fifty years it has been the settled policy of Kentucky to provide a shorter period of limitation for negotiable instruments than for those which are not negotiable, may, perhaps, be a sufficient warrant for construing the sections quoted as providing one period of limitation, namely, five years, for *negotiable instruments*, and another period, namely, fifteen years, for *non-negotiable instruments*. If such is the correct construction, the period of limitation for negotiable notes is five years.

§ 185. **Check Defined.**—A check is a bill of exchange (*a*) drawn on a bank (*b*) payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check (*c*).

Eaton and Gilbert, Com. Paper, 628. *Norton, B. & N.,* 405, 408.

(*a*) "Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not (section 190).

(*b*) Shrieve v. Duckham, 1 Litt. (11 Ky.) 195;
Humphries v. Bicknell, 2 Litt. (12 Ky.) 297;
Smith v. Jones, 2 Bush (65 Ky.) 106;
Lester v. Given, &c., 8 Bush (71 Ky.) 359.
See as to protest of checks, sections 118, 129.

(*c*) Section 89 provides that, "except as herein otherwise provided," *any* drawer or indorser to whom notice of dishonor is not given is *discharged;* and section 185 provides that "except as herein otherwise provided, the provisions of this Act applicable to bills of exchange payable on demand apply to a check." Unless, therefore, it is otherwise provided somewhere in the Act, notice of dishonor must be given to the drawer of a check in all cases in which it must be given to the drawer of any other bill; and if such notice be not given, the drawer of the check is discharged. There does not seem to be any provision in the Act which qualifies section 89 as to notice to the drawer of a check, and the Act has there-

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fore probably changed the former law under which a failure to notify the drawer operated to discharge him to the extent only of the loss incurred by him by reason of such failure. (See Daniel, Neg. Inst. (5th Ed.) section 1587.)

Section 186 provides that an unreasonable delay in presenting a check for payment discharges the drawer from liability thereon to the extent only of the loss caused by the delay; and there is no satisfactory reason why a distinction should be made between the effect of a delay in presenting the check and a delay or failure in giving notice. The point, however, is not whether such a distinction ought to have been made, but whether or not it has been made.

The discharge of the drawer *on the instrument* does not, of itself, affect his liability on the original debt. As to protest of checks, see sections 118, 119, 91.

§ 186. **Within What Time a Check Must be Presented.**—A check must be presented for payment within a reasonable time after its issue (*a*), or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay (*b*).

Eaton and Gilbert, Com. Paper, 630. *Norton, B. & N.,* 414.

(*a*) The facts in each case must determine what is a reasonable time in that case (section 192).

Where there is no dispute as to the facts, the question of what time is reasonable is a question of law.

Cawein v. Browinski, 6 Bush (69 Ky.) 460;

Citizens' State Bank v. Cowles, 80 N. Y. S., 598; 86 N. Y. S., 38.

Presentment the day after a check is drawn is sufficient to charge the drawer in case of non-payment, although the holder had reasonable time to and could have presented it on the day it was drawn, and on the following day. *Ib.*

(*b*) Smith v. Jones, 2 Bush (65 Ky.) 106;

Lester v. Given, &c., 8 Bush (71 Ky.) 360.

But although a failure to present within a reasonable time does not discharge the drawer except to the extent of the loss caused by the delay, it is otherwise as to indorsers. Unless presentment be made within a reasonable time and notice of dishonor be duly given, the indorsers are discharged, whether or not they have suffered loss by the delay. See sections 70, 89. And it should be

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remembered that by section 53, where a check is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§ 187. **Certification of Check; Effect of.**—Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance (*a*).

Eaton and Gilbert, Com. Paper, 633. *Norton, B. & N.,* 422.

(*a*) An acceptance makes the acceptor liable according to the tenor of the instrument at the time of the acceptance (section 62). Therefore a bank certifying a check is liable for the amount called for by the check at the time of the certification, even though it be larger than the original amount called for by the drawer.

It follows that a bank paying a raised check can not recover the excess paid from a holder in due course. In these particulars this section and section 62 have changed the law. Daniel, Neg. Inst. (5th Ed.) sections 540, 1661.

Whether the bank paying such a check can charge more than the original amount of it to the drawer depends on whether the drawer has by his own act or omission precluded himself from setting up the forgery.

§ 188. **Effect Where the Holder of Check Procures it to be Certified.**—Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon (*a*).

Eaton and Gilbert, Com. Paper, 635. *Norton, B. & N.,* 423.

(*a*) This section applies only where the *holder* procures the acceptance or certification. Where a check is certified when delivered by the maker, the drawer's relations, rights and liabilities to the holder are the same as if the check had not been certified. Eaton and Gilbert, *supra.*

Where the holder acquired a check from the payee by delivery without indorsement and presented it at the bank, which certified it, the certification was for the holder, and not for the payee, al-

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though the bank did not know that the person presenting it was the holder.

Meurer v. Phenix Nat. Bank, 86 N. Y. S., 701; 88 N. Y. S., 83.

One who has received payment of a certified check but had repaid the money received thereon when threatened with suit, can not maintain an action against the bank on its acceptance or certification, the payment having discharged the check.

Poess v. Twelfth Ward Bank, 86 N. Y. S., 857.

§ 189. **Check Does Not Operate as an Assignment of Fund.**—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank (*a*), and the bank is not liable to the holder, unless and until it accepts or certifies the check (*b*).

Eaton and Gilbert, Com. Paper, 636. *Norton, B. & N.,* 419.

(*a*) This has changed the law of Kentucky as declared in Lester v. Given, 8 Bush (71 Ky.) 360 and in Weinstock v. Bellwood, 12 Bush (75 Ky.) 140; Deatheridge v. Crumbaugh, 8 K. L. R., 592; Rosenbaum v. Lytle, 8 K. L. R., 607; Merchants' Nat. Bank v. Robinson, 97 Ky., 552; 17 K. L. R., 368; 31 S. W., 136; 28 L. R. A., 760; Columbia Fin. & Trust Co., v. First Nat. Bank, 25 K. L. R., 561; 76 S. W., 156.

The death of a drawer of a check operates as a revocation of it, so that the bank paying it, after notice of the death, does so at its peril.

Weiand v. State Nat. Bank, 112 Ky., 310; 23 K. L. R., 1517; 65 S. W., 617; 66 S. W., 26.

(*b*) This provision has changed the law of Kentucky. See cases under note (*a*).

The acceptance of a check must be in writing.

Baltimore & O. R. Co. v. First Nat. Bank, 47 S. E. (Va.) 837.

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TITLE IV.—GENERAL PROVISIONS.

ARTICLE I.

Section 190. Definition and meaning of terms.
191. Person primarily liable on instrument; person secondarily liable.
192. Reasonable time, what constitutes.
193. Time, how computed when last day falls on Sunday or holiday.
194. Application of chapter.
195. Inconsistent laws repealed.

§ 190. **Definitions and Meaning of Terms.**—In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

Note.—The numbers of the sections of this article in other States than Kentucky are as follows: Sections 190-194 are in Colorado, Idaho, Iowa, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Pennsylvania, Utah, Virginia and Washington, 191-195; Maryland, 14-18; New York, 2-6; Ohio, 3178*a*-3178*d*; Oregon, 190-192; Rhode Island, 2-6; Wisconsin, 1675. In Arizona, District of Columbia, Florida and Tennessee, the sections of this article are not numbered.

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"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

§ 191. **Persons Primarily Liable on Instrument; Person Secondarily Liable.**—The person "primarily" liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other persons are "secondarily" liable (*a*).

(*a*) The maker of an accommodation note is not relieved from liability by an extension of the time of payment given to the indorser without his consent, he being, under sections 29 and 191, the "person primarily liable" and absolutely required to pay.

Nat. Citizens' Bank v. Toplitz, 81 N. Y. S., 422; 81 App. Div., 593.

§ 192. **Reasonable Time, What Constitutes.**—In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Norton, B. & N., 343.

§ 193. **Time, How Computed, When Last Day Falls on Sunday or Holiday.**—Where the day, or the last day for doing an act herein required or permitted to

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be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day (*a*).

(*a*) This Act was *passed*, that was approved by the Governor quired the act to be done on the next preceding business day.

As to what days are holidays in Kentucky, see note (*b*) to section 85.

§ 194. **Application of Chapter.**—The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof (*a*).

(*a*) This Act was *passed*, that is, was approved by the Governor of Kentucky March 25, 1904. As it had no "emergency clause," it did not, under section 55 of the Constitution, *become a law* until June 13, 1904, ninety days after the adjournment of the Assembly. The words, "prior to the passage hereof," are equivalent to "before the time when this Act shall become a law."

Lucas, *ex parte*, 160 Mo., 218;
Harding v. People, 10 Colo., 387.
State v. Bemis, 45 Neb., 724;
Charless v. Lumberson, 1 Iowa, 435;
Rogers v. Vass, 6 Iowa, 405;
Osborn v. Charlevoix, 72 N. W. (Mich.) 982.

§ 195. **Inconsistent Laws Repealed.**—All laws inconsistent with this act are hereby repealed.*

*The Negotiable Instruments Law in all other States that have adopted it contains this provision: "In any case not provided for in this Act, the rules of the law merchant shall govern."

The New York and Ohio Acts add an additional article which, in both States (New York, section 330, Ohio, section 3178*g*) makes a provision substantially the same as that of section 4223, Ky. Stats., concerning notes given for patent rights.

The New York Act contains a further provision (section 331) concerning notes "given for a speculative consideration," and a provision (section 332) as to the manner in which negotiable corporate or municipal bonds may be made non-negotiable.

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APPENDIX.

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